20

267

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 268

FULTON NATIONAL BANK OF ATLANTA, PETITIONER,

vs.

I. S. HOOPER AND THEODORE G. SMITH, JOHN R. JOHNSTON AND EDWARD L. GILMORE, AS RECEIVERS OF DERRIS & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1939

CERTIORARI GRANTED NOV. 6, 1939

(28,268)

(30,060)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 260

FULTON NATIONAL BANK OF ATLANTA, PETITIONER,

vs.

I. S. HOOSIER AND THEODORE G. SMITH, JOHN B. JOHNSTON AND EDWARD L. GILMORE, AS RECEIVERS OF IMBRIE & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

& DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1924

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION.

THE BEAVER BOARD COMPANIES,
Plaintiff,
against In Equity, No. .....

JAMES IMBRIE, WILLIAM MORRIS IMBRIE, ROSWELL C. TRIPP, CHARLES G. WEST, JR., DAVID T. WELLS, WALDO S. KENDALL AND WILLIAM MINOT, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF IMBRIE & CO.,
Defendants.

To the Honorable Judges of the District Court of the United States, for the Northern District of Georgia, Northern Division:

The petition of Theodore G. Smith and John B. Johnston, respectfully shows to this Honorable Court:

1. That on the 3rd day of March, 1921, your petitioners, by an order duly made by the Hon. Martin T. Manton, one of the Circuit Judges of the District Court of the United States, in and for the Southern District of New York, were duly appointed Receivers of the assets, estate and effects of the above named defendants in the above entitled action, being required to file a bond in the sum of Fifty thousand dollars.

2. Your petitioners have duly accepted the trust in them reposed and have duly filed a bond as directed by the order of Hon. Martin T. Manton.

3. The defendants are co-partners engaged in business as Bankers and dealers in securities, with their principal place of business at No. 61 Broadway, in the Borough of Manhattan, City, County and State of New York, and in the Southern District of New York, and that they have numerous branch offices, one of which is located in the City of Atlanta, County of Fulton, State of Georgia, and within the juris-
2 diction of this Court.

4. That on the 3rd day of March, 1921, a Bill of Complaint was duly filed in the District Court of the United States, for the Southern District of New York, by The Beaver Board Companies, as plaintiff, against the said James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners doing business under the firm name of Imbrie & Co., as defendants, for the purpose of having a Receiver or Receivers appointed of all and singular the property and assets of every nature, and wheresoever situated, of the said co-partnership.

5. The nature of the cause of action is more particularly referred to in the Bill of Complaint, an exemplified copy of which is hereto annexed and made a part hereof.

6. That simultaneously with the filing of the said Bill of Complaint, an application was made for the appointment of a Receiver, and that your petitioners were duly appointed as such Receivers, as set forth in Paragraph 1, hereinabove mentioned.

7. That the defendants own and possess certain property, consisting of securities, equities in bank pledges, accounts receivable, together with moneys deposited in banking institutions and valuable furniture and fixtures in their office located in the City of Atlanta, County of Fulton, State of Georgia, and your petitioners are informed and verily believe that certain creditors are threatening suits against the said property, and that attachments are about to be issued or may be issued against the said property, as there are considerable outstanding and past due obligations. In the event suits are brought, these defendants have no valid or legal defense, and if such suits and attachments are issued, the creditors of this estate, as well as your petitioners, will sustain irreparable dam-
3 age and loss by reason of Court costs and the damage incident to such interference with the property of the defendants.

8. That in the opinion of your petitioners, the property, assets and effects of the defendants located at Atlanta, Georgia, are worth in excess of secured and unsecured debts in the neighborhood of about Five Thousand ($5000.00) Dollars.

9. Your petitioners are of the opinion, and verily believe, that it is absolutely necessary for the preservation of the property of the defendants and the protection of the creditors interested herein, that Ancillary Receivers be appointed by this Court.

10. That annexed hereto is a certified copy of the order appointing your petitioners as such Receivers with a certification as to the due approval of the bond of your petitioners as such Receivers, as well as an exemplified copy of the Bill of Complaint in the United

States District Court in and for the Southern District of New York, together with a certified copy of the Answer interposed by the defendants herein.

That no previous application for such order has heretofore been made.

Wherefore, your petitioners pray for an order of this Court appointing Ancillary Receivers of all the property, assets and effects of the above named James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Walso S. Kendoll and William Minot, co-partners doing business under the firm name of Imbrie & Co., defendants, which are situated within this jurisdiction, to care for and preserve same until the further order of this Court and for an order of this Court directing the agents, employees and all other persons, including creditors, to deliver into the possession of the Ancillary Receivers so appointed all the property of the said James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners doing business under the firm name of Imbrie & Co., defendants, which are not exempt by law, and otherwise to comply with the terms of the said order; and that the defendants and each of them, their agents, servants and attorneys, and all persons, be restrained and enjoined from in any way interfering with the possession of the said property, other than to turn the same over to the said Ancillary Receivers.

4

Dated N. Y., March 4th, 1921.

THEODORE G. SMITH,
JOHN B. JOHNSTON,
Petitioners.

State of New York,
City and County of New York, ss:

Theodore G. Smith and John B. Johnston, being severally, duly sworn, depose and say: That they are the petitioners named in the foregoing petition; that they have read the foregoing petition and know the contents thereof; that the same is true of their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, they believe it to be true.

THEODORE G. SMITH,
JOHN B. JOHNSTON.

Sworn to before me, this 4th day of March, 1921.

HERMAN SIEPKE, JR.,
(Seal) Notary Public.

Kings Co., Clerk's No. 501, Reg. No. 1249.
N. Y. Co. Clerk's No. 723, Reg. No. 1610.
Commission expires March 31, 1921.

5 The President of the United States of America,

To all to whom these Presents shall come, Greeting:

Know ye, that we having inspected the records and files of the District Court of the United States for the Southern District of New York, do find certain paper writings there, remaining of record, in the words and figures following, to-wit:

United States District Court, Southern District of New York.

The Beaver Board Companies, Plaintiff,

against

James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners, doing business under the firm name of Imbrie & Co., Defendants.

To the Judges of the District Court of the United States for the Southern District of New York:

1. The plaintiff, The Beaver Board Companies, is a corporation duly organized and existing under the laws of the State of Delaware, and is a citizen and resident of said State.

2. The defendants, James Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, are citizens of the State of New York, and residents and inhabitants of the Southern District of New York. The defendant William Morris Imbrie is a citizen and resident of the State of New Jersey, and the defendants, William Minot and Waldo S. Kendall are citizens and residents of the Commonwealth of Massachusetts. Said defendants are co-partners engaged in the business of bankers and dealers in securities, under the firm name of Imbrie & Co., with their principal place of business at 61 Broadway, Borough of Manhattan, New York City, and said firm of Imbrie & Co. is an inhabitant and resident of the Southern District of New York, State of New York.

2. That at the time of the making of the contract, December 15th, 1920, for the purchase of certain notes of this complainant, out of which the indebtedness hereinafter described arose. Frederico Lage was a member of the firm of Imbrie & Co. and claims to have ceased to be such partner on December 31, 1920, the defendants continuing the business of Imbrie & Co. and assuming its obligations, and plaintiff reserves and does not waive its claim against said Lage as a member of the firm of Imbrie & Co. at the time of the execution of the aforesaid agreement with said firm.

3. This is a suit of a civil nature in equity and is between citizens of different states, and the matter in dispute exceeds the sum of $5,000, exclusive of interest and costs.

4. At divers times between December 15, 1920 and March 2, 1921, the defendants including Frederico Lange in consideration of the delivery to them of promissory notes of the plaintiff, which defendants re-sold, promised and agreed to pay to this plaintiff or to its order on demand, sums of money as the purchase price of said notes and credited the plaintiff with said sums as money deposited with the defendants in the plaintiff's account. On March 2, 1921, there remained with the defendants of the said moneys so deposited as aforesaid a balance undrawn by this plaintifff in excess of $5,000. On March 2, 1921, the plaintiff duly demanded from the defendants the repayment to this plaintiff of the said balance, but that defendants refused
7 and still refuse to repay the same. The defendants are justly indebted to the plaintiff in said sum on account of the moneys had and received to the use of the plaintiff, which sum the defendants have failed and refused to pay. There is justly due and

owing from the defendants to the plaintiff said sum with interest from March 2, 1921, which the plaintiff claims. Plaintiff reserves all right to follow the said notes into the hands of the defendants and all other persons, firms or corporations, if it should appear that plaintiff had the right to rescind the contract under which said notes were obtained by defendants or if it should otherwise appear that plaintiff has some right, title, lien or interest in and to said notes or that the transfer, hypothecation, or other use thereof by defendant was contrary to the rights of the plaintiff; and reserves all rights against the property of the individual members of the firm of Imbrie & Co. and against the property of Frederico Lage, a past member of said firm; and the right to have all property of defendants so marshaled as to preserve plaintiff's interests in the matters herein reserved.

5. The defendants state as their reasons for refusing to pay said sum that the defendants have not presently available cash sufficient to pay the same; that the defendants have large sums invested in corporate, municipal and governmental securities and accounts receivable from corporations, firms and individuals; that in addition the defendants own large amounts of stocks, bonds or other securities of railroad and industrial corporations doing business within the United States and elsewhere; that some of such corporations rely upon the defendants to supply from time to time funds needed for their corporate purposes; that in addition the defendants operate a private banking department and that deposits and withdrawals regularly and daily occur therein in the regular course of business; that many of the stocks, bonds and other securities owned by the defendants are pledged with various banks and trust companies as

collateral security for loans; that to require the defendants to liquidate at one time a large amount of the securities owned by them would so depress the value of the collateral held by such banks and trust companies as aforesaid, and would adversely affect the right of other creditors of the defendants similarly situated and the rights of depositors in said banking department of the defendants; that the assets of said defendants according to the books thereof on December 31, 1920, exceeded the sum of $13,500,000, and the liabilities were about $11,810,000, so that the capital of such defendants was then shown to be, according to such books, about the sum of $1,740,000; that since January 1, 1921, certain of the assets included in the foregoing statement, while not impaired in intrinsic value, have lost some of their liquid qualities, so that a forced sale of large quantities thereof would not find a ready market, and would result in needless sacrifice to the interests not only of the defendants but of the plaintiffs and all other creditors of the defendants similarly situated.

6. Plaintiff believes the foregoing statement and reasserts the same to the best of his knowledge, information and belief. Plaintiff, while it would be willing to permit the liquidation of the assets of the defendant to take place in due course of business, and believes that thereby its interest and the interests of all other creditors similarly situated would best be served, is informed and believes that other creditors of the defendants are pressing for full and prompt payment; that before the plaintiff could enforce its said claim through action at law other creditors may precipitate matters to the detriment of the plaintiff and other creditors similarly situated; that such creditors would in

addition obtain preferences and priorities, to
9 the irreparable injury to the plaintiff, and that it has no adequate remedy at law in the premises. An attempt by the plaintiff to enforce at law its claims as a general creditor would precipitate similar action on the part of other creditors, and this in turn would lead to wasteful strife and controversy, which plaintiff believes can be avoided and the property preserved for equitable distribution among those entitled thereto, and only by the intervention of a Court of equity and the granting of equitable relief.

7. Immediate and irreparable loss and damage would result to plaintiff and others similarly situated before the matter can be heard on notice and such loss or damage would necessarily result from the foregoing facts.

Wherefore, plaintiff prays:

1. That the rights of plaintiff and of all creditors of the defendants may be ascertained and decreed and that the Court fully administer the fund in which the plaintiff is interested, constituting the entire assets of the defendants doing business as such firm as aforesaid, and will for such purpose marshal all the assets of such defendants and ascertain the several and respective liens and priorities existing thereon and enforce and decree the rights, liens and equities of the creditors of such defendants as the same may be finally ascertained and decreed by the Court.

2. That for the purpose of preserving the assets of such defendants from impairment a Receiver may be appointed for the defendants as such co-partnership and

all their property and assets, real, personal and mixed, of whatever kind and description and wherever situated, with full power to sue for, collect, receive and take into his possession goods, chattels, rights, credits, monies, effects, books, papers, choses in action, accounts and assets of every description, with all the incidental powers ordinarily invested in Receivers in like cases, and with full power and authority to receive all rents, issues, profits, dividends, interest and income thereof, and to apply the same under the orders or decrees of this Court and to preserve said assets from being sacrificed in any proceedings liable to prejudice or sacrifice the same and to do any and all acts and things which may be necessary to preserve the estate.

3. That an injunction may issue against the defendants and each of them and all persons claiming by and acting by, through or under them, and all other persons, to restrain them from interfering with said receiver or his taking possession of said property.

4. That a Receiver and injunction may be granted pending this suit as prayed for and that plaintiff have such other and further relief as the Court may deem proper and equitable.

5. That a Writ of Subpoena may be granted to plaintiff and directed to the defendants and each of them thereby requiring them and each of them personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath; answer under oath being hereby expressly waived, and further to perform and abide by such fur-

ther order, direction or decree as to the Court may seem meet.

PENNEY, DAVIS, MARVIN & EDMONDS,
Solicitors for Plaintiff.
35 Nassau Street,
New York City.

Counsel:
ARBOR B. MARVIN.

11 State of New York,
County of New York, ss:

William F. MacGlashan being duly sworn says: I am the President of The Beaver Board Companies, the plaintiff aforesaid, and make this affidavit for and in its behalf and am duly authorized to do so. The foregoing Bill of Complaint is true as I verily believe, and as to those matters not alleged on knowledge the source of my knowledge and the grounds of my belief are stated in said Bill.

WILLIAM F. MacGLASHAN.

Sworn to before me this 3rd day of March, 1921.
JOHN J. DWYER,
Notary Public, New York
County No. 154.

All of which we have caused by these presents to be exemplified, and the Seal of the said District Court to be hereunto affixed.

Witness, the Honorable Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New

York, in the Southern District of New York, this 4th day of March, in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty-fifth.

ALEX GILCHRIST, JR.,
Clerk.

12 United States of America,
Southern District of New York, ss:

I, Augustus N. Hand, one of the Judges of the District Court of the United States for the Southern District of New York, do hereby certify, that Alexander Gilchrist, Jr., whose name is subscribed to the preceding exemplification, is the Clerk of the said District Court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the said exemplification is the Seal of the said District Court, and that the attestation thereof is in due form of law.

Dated New York, March 4th, 1921.

AUGUSTUS N. HAND,
United States District Judge.

United States of America,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify, that Hon. Augustus N. Hand, whose name is subscribed to the preseding Certificate, is one of the Judges of the District Court of the United States for the Southern District of New York, duly appointed and sworn, and that the signature of said Judge to said Certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Court, at the City of New York, in the Southern District of New York, 4th day of March, 1921.

(Seal) ALEX GILCHRIST, Clerk.

---

13 ORDER.

United States District Court, Southern District of New York.

The Beaver Board Companies, Plaintiff,
against
James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minor, co-partners doing business under the firm name of Imbrie & Co., Defendants.

This motion came on to be heard at this term and was argued by counsel, and defendants having duly appeared, upon filing of the bill, and upon the hearing of this motion, and having filed an answer to the bill of complaint; and the cause having been argued by counsel, and it appearing clearly by verified bill and affidavit that immediate irreparable injury and damage will result to the plaintiff before notice can be served, and a hearing had thereon, because precipitate action on the part of other creditors would waste, prejudice and sacrifice the assets upon which plaintiff and other creditors must rely for their security and payment; thereupon, upon consideration, it was

Ordered, adjudged and decreed, as follows:

1. That pending this suit and for the purpose of preserving the assets of the defendants constituting the firm of Imbrie & Co. from impairment, Theodore G. Smith and John B. Johnston be and they hereby are appointed receivers for the defendants as such co-partnership and all their property and assets, real, personal and mixed, wherever located, including all lands, real estate, buildings, machinery, equipment, raw materials, supplies, accounts receivable, cash, bills
14 receivable, money in bank, and all other things in action, and all books of accounts, records, vouchers and other papers, with full authority forthwith to take possession of, carry on and manage the same, and continue the business of the said defendant, in their discretion, until the further order of this Court, and to do all and any such things as may be necessary to preserve and protect said properties, with power to the said Receivers to employ, discharge, and fix the compensation of agents and employees, and with power to the said Receivers to make such disbursements and payment as may be needful in connection with the administration of this trust and the continuance of the business of the defendant and the administration of their properties; with power to purchase and sell for cash or on credit, any property, as may be advisable; to collect and receive income, accounts receivable and other properties and moneys to which the defendants may be entitled; to make such payments for taxes, and to make such payments to such persons as may be entitled to priority as may be deemed proper and lawful; to institute, prosecute, defend, compromise, adjust, intervene in or become a party to such suits, actions, and proceedings at law or in equity, including ancillary proceedings in State or Federal Courts as may in their judgment be advisable; to compromise, defend, make allowances upon, or other-

wise adjust any claim of or against the defendant; to defend, prosecute, discontinue, adjust or otherwise dispose of any pending suits or litigation in which the defendants or either of them may be a party, or in which they or either of them may have an interest; and it is further

Ordered, adjudged and decreed, that the said Receivers may retain and employ counsel to advise, guide and assist in the administration of this estate; and it is further

Ordered, adjudged and decreed, that the joint bond of the Receivers, conditioned that they will fully and truly perform the duties of their office and abide by the further direction of this Court, is hereby fixed in the sum of Fifty thousand Dollars, and such Bond shall have surety or sureties to be approved by this
15 Court, and shall forthwith, upon such approval, be filed with the Clerk of this Court; and it is further

Ordered, adjudged and decreed, that the defendants individually, and as members of the said firm of Imbrie & Co., and each and every of their agents, employees and all creditors of the said defendant, individually and as members of the firm of Imbrie & Co., and all Marshals, Sheriffs, Constables, and all Deputies and servants, and all other officers, and generally all persons, firms and corporations whatsoever, are hereby enjoined from removing, transferring or disposing of, or attempting to remove, transfer or dispose of, or in any way interfere with any of said properties, or from doing anything whatsoever, or issuing out any process or bringing any proceeding or suits at law or in

equity or continuing any pending suit against the defendants or from doing anything of any nature to interfere with the possession and control by the said Receivers of any property of the said defendants, and it is further

Ordered, adjudged and decreed, that the said Receivers may apply to the Courts of other jurisdictions for the appointment of Ancillary Receivers if they find it necessary and expedient do so; and it is further

Ordered, adjudged and decreed, that all creditors of the above-named defendant known to the Receivers shall show cause before me at 439 Room, Post Office Building, in the City of New York, Borough of Manhattan, on the 7th day of March, 1921, at 3 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why the said Receivership and injunction should not be continued and made permanent during the pendency of this suit, and that a copy of this Order shall be served by mail, under the direction of the Receivers, to all known creditors of the defendant as appears upon the books of the said defendant company, on or before the 5th day of March, 1921, and that the said Order shall be published in the New York Times on the 5th day of March, 1921, and that such mailing and publication shall be due and sufficient service of this Order; and it is further

16

Ordered, adjudged and decreed that the said Receivers shall have leave to apply to this Court for such other further orders and authority at any time hereafter as may be deemed proper by this Court.

Dated N. Y., March 3rd, 1921.

MARTIN T. MANTON,
U. S. C. J.

(Indorsed):—U. S. District Court, S. D. of N. Y.; Filed March 3, 1921.

I hereby certify that the foregoing is a true copy and that the bond required has been approved and filed.

ALEX GILCHRIST, JR.,
(Seal) Clerk.

United States District Court, Southern District of New York.

The Beaver Board Companies, Plaintiff,

against

James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners doing business under the firm name of Imbrie & Co., Defendants.

The defendants answering the bill of complaint herein admit all the allegations of said bill of
17 complaint and join in the prayers of said bill of complaint.

RABENOLD & SCRIBNER,
Attorneys for Defendants, Office and Post Office Address, 61 Broadway, Borough of Manhattan, New York City.

State of New York,
County of New York, ss:

James Imbrie, being duly sworn, says: I am one of the defendants above named. The foregoing Answer is true as I verily believe, and the allegations in the bill of complaint as to the matters stated by defendants to plaintiff are correctly set forth and are true to the best of my knowledge, information and belief, and I make this verification on behalf of myself and said firm of Imbrie & Co., being thereunto duly authorized.

JAMES IMBRIE.

Sworn to before me this 3rd day of March, 1921.
(Notary Seal) SAMUEL MILLER,
Notary Public, New York County No. 121. New York Register 1111.

A true copy.

ALEX GILCHRIST, JR.

Filed March 7th, 1921.

---

18 TRANSCRIPT OF RECORD FROM THE SUPERIOR COURT OF FULTON CO., GA.

Georgia,
Fulton County:
To the Superior Court of said County:

The petition of J. H. Hilsman, doing business as J. H. Hilsman & Company, of Fulton County, and The First Trust & Savings Corporation, a corporation of the State of Georgia, respectfully shows:

1st. That Imbrie & Company, a co-partnership, is composed of James Imbrie, Wm. Morris, Roswell C. Tripp, Chas. G. West, David T. Wells, W. H. Kendall, and William Minot, all of whom are non-residents of the State of Georgia.

2nd. Imbrie & Company is engaged in a brokerage business; it sells and buys bonds, stocks and other securities for its customers, accepting the funds of its customers for this purpose and charging a commission for its services.

3rd. Said Imbrie & Company's principal office and place of business is in the State and City of New York; said Company has branch offices in a number of cities throughout the United States.

4th. Said company operates a branch office in the City of Atlanta, its offices being located on the first floor of the Piedmont Hotel, and its business is managed in said City by Davenport Pogue.

5th. Your petitioner, J. H. Hilsman, doing business as J. H. Hilsman & Company, on February 26, 1921, turned over to said Imbrie & Company at its offices in Atlanta, Georgia, Eight Thousand ($8000.) Dollars of registered liberty bonds, with instructions to sell said bonds, and to re-purchase for petitioner unregistered bonds of a like amount.

6th. While the transaction between Imbrie & Company and petitioner took place in Atlanta, Georgia, the sale of said bonds and the re-purchasing of other bonds would be consummated at the office of Imbrie & Company in the City of New York.

7th. On March 3rd petitioner received notice from said Imbrie & Company that said registered liberty bonds had been sold and that unregistered bonds in the sum of Eight Thousand ($8000.00) Dollars had been purchased for petitioner, to-wit: $3,000.00 in first 4¼'s; $5,000.00 in second 4¼ bonds; that said
19 bonds had been forwarded to the Atlanta office of Imbrie & Company, to be delivered to petitioner.

8th. Your petitioner, The First Trust & Savings Corporation, likewise turned over to said Imbrie & Company Five Thousand ($5,313.75) Dollars in cash, with instructions to purchase for it fifty (50) shares of common stock in the Pullman Company. Said sum was turned over to the Atlanta branch of said Imbrie & Company, but said purchase was to be consummated at the office of said Imbrie & Company in New York City. Petitioner received notice that said stock had been purchased for its account on or about February 25th, 1921.

9th. Petitioners show that they have made demand upon the Atlanta office for the possession of said bonds and stocks respectively, and possession of said bonds and stocks has been refused, and said Atlanta office is unable, or unwilling to give petitioner any information respecting said transactions.

10th. Petitioners show that said Imbrie & Company has become insolvent, and that creditors in other jurisdictions are proceeding against said Company in Court for the collection of their debts, and the preservation of the assets of said Imbrie & Company; petitioners are unable to state the nature of said proceedings, or the extent to which said proceedings have gone.

11th. Petitioners show that all the assets of said Imbrie & Company in this State are removable, consisting principally of personal property, and of stocks and bonds belonging to its customers, with moneys in the nature of trust funds, and of office furniture and fixtures.

12th. Petitioners show that the funds turned over by them to said Imbrie & Company are in the nature of trust funds, and that the property purchased with said funds belongs to your petitioners, and the title thereto is impressed with a trust in petitioner's favor.

20 13th. Said funds can only be traced through the books and records of said Imbrie & Company, the exact property in which said funds have been invested can only be identified through said books and records.

14th. Petitioners show that unless the physical assets of said Imbrie & Company are taken possession of by some particular party and placed in the custody of the Court, that said assets will be carried and sent out of the jurisdiction of this Court, and it will be impossible for petitioners or others similarly situated, to recover the assets belonging to them, or to obtain the funds turned over to said Imbrie & Company.

15th. Petitioners are without any adequate remedy at law, and unless a Court of equity will immediately take possession of all assets of said Company in this jurisdiction, said assets, together with the books and records by which they may be identified, will be removed from the jurisdiction of this Court.

Wherefore, petitioners pray:

1st. That process issue, requiring said defendant to be and appear at the next term of this Court to answer this complaint.

2nd. That a Receiver be appointed to take possession of all the assets of said Imbrie & Company, of every character and nature, including all of the books and records of said Company within the jurisdiction of this Court.

3rd. That said defendants, and each of them, and their Agents and Representatives, be restrained and enjoined from removing any of the assets of said Imbrie & Company, including all stocks, bonds, moneys, accounts and bills receivable, books and records of every character, from the office of said Imbrie & Company in Atlanta, Georgia, or from drawing out any funds of said Company in the Banks, Trust Companies or any other depositories whatsoever.

SPALDING, MacDOUGALD & SIBLEY,
Attorneys for Petitioners.

21 Georgia,
Fulton County:

Personally appeared before me, the undersigned, an officer in and for said County, authorized to administer oaths, J. H. Hilsman and R. W. Courts, Jr., who on oath say that the allegations in the foregoing petition are true.

R. W. COURTS, JR.,
J. H. HILSMAN.

Sworn to and subscribed before me this the 3rd day of March, 1921.

J. F. SETTLE,
Notary Public, Fulton
County, Georgia.

TEMPORARY RESTRAINING ORDER, AND ORDER APPOINTING RECEIVER, ETC.

Read and considered. Let the defendants show cause before me on the 12th day of February, 1921, at 9:30 o'clock, why the prayers of the foregoing petition should not be granted. In the meantime the defendants and each of them, their agents and representatives, be and are hereby restrained and enjoined from removing, carrying away, transporting or sending any of the property of said Imbrie & Company including all personal property of every character, stocks, bonds, or other securities in the name of said Company, or in the name of any of its customers or clients, together with all moneys, papers, notes, bills receivable, accounts, and each and every other character or property, from without the jurisdiction of this Court, and from without the limits of Fulton County, Ga.

It is further ordered, considered and adjudged, that Remsen P. King be and is hereby appointed Receiver, to take charge and possession of all of the property, goods, chattels, effects, including all moneys, books of account, and all and every other kind and character of property whatsoever belonging to or in the custody of said Imbrie & Co., or in anywise connected with the transaction of its business.

It is further ordered that said defendants, their agents or representatives, turn over to and give pos-

session to said Remsen P. King, Receiver, all of said property above described, and be and are hereby ordered to turn over to said Receiver all keys belonging to or used in connection with said business, including office keys and keys to lock boxes to banks or any other place where the property of said Imbrie & Co., or its clients, is kept.

Given under my hand and official signature this March 3, 1921.

GEO. L. BELL,
Judge Superior Court, Fulton County, Ga.

State of Georgia,
County of Fulton:

J. H. Hilsman & Co., et al.,

vs. Complaint.

Imbrie & Co., a Co-Partnership composed of James Imbrie, Wm. Morris, R. C. Tripp, C. G. West, D. T. Wells, W. H. Kendall and Wm. Minot.

To the Sheriff or His Deputy of said County, Greeting:

The defendant, Imbrie & Co., a co-partnership, is hereby required personally or by attorney to be and appear at the Superior Court, to be held in and for said County, on the first Monday in May, 1921, then and there to answer the Plaintiff's complaint, as in default thereof said Court will proceed, as to justice shall appertain.

Witness, the Honorable J. T. Pendleton, Judge of said Court this 3rd day of March, 1921.

T. C. MILLER,
Deputy Clerk.

Georgia,
Fulton County:

I have this day served the Defendant, Imbrie & Co., a co-partnership, by serving a copy of the within Bill and Order upon Davenport Pouge, one of the joint managers for defendant in charge of its offices at Atlanta. This March 4th, 1921.

R. M. HOLLAND,
Deputy Sheriff.

Filed in Office this the 3rd day of March, 1921.

T. C. MILLER,
Deputy Clerk.

23 Fulton Superior Court.

J. H. Hilsman & Company, et al.,
vs. No. 47828.
Imbrie & Company.

And now, before the time for answering this case, comes Imbrie & Company, and appearing specially for this purpose and for none other respectfully shows:

1. The petitioners in this case are and were at the time of filing suit, citizens and residents of Fulton County, Georgia.

2. The Intervener, Robinson-Humphrey Company, who has intervened and been made a party plaintiff, is and was at the time of filing suit, a citizen and resident of Fulton County, Georgia.

3. The defendant, Imbrie & Company, is and was at the time of filing said suit, a partnership, having its principal office in the City of New York, State of New York, and the partners composing said firm are and were at the time of the filing of said suit non-residents of the State of Georgia, said partners being as follows: James Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells are citizens of the State of New York and residents and inhabitants of the Southern District of New York; Wm. Morris "Imbrie" is a citizen and resident of the State of New Jersey; and William Minot and Waldo S. Kendall are citizens of the Commonwealth of Massachusetts.

4. This suit is of a civil nature, wholly between citizens and residents of different States, and the sum or value in controversy exceeds the sum or value of Three Thousand Dollars, exclusive of interest and costs, in that the suit is to administer assets far exceeding in value the sum of Three Thousand Dollars, exclusive of interest and costs.

Wherefore, the said defendants, appearing specially for this purpose and for none other, tender herewith, their petition and bond for the removal of this suit into the District Court of the United States for the Northern District of Georgia, and present also evidence of the service of a written notice of the petition and bond prior to filing the same, and respectfully prays that this Court will accept said petition and bond and proceed no further in this suit, and will enter
24 an order directing the removal of the same into the said District Court of the United States for the Northern District of Georgia.

McDANIEL & BLACK,
Petitioners' Attorneys.

State of Georgia,
County of Fulton:

In person appeared E. R. Black, who on oath says that he is attorney for the defendants in the above stated case, and that all of said defendants are non-residents and therefore not available for the purpose of verifying this petition. Deponent therefore verifies this petition and says that the facts recited therein are true.

E. R. BLACK.

Sworn to and subscribed before me, this March 8, 1921.

W. P. GOLDSTEIN,
Notary Public, State at Large, Georgia.

Fulton Superior Court.

J. H. Hilsman & Company, et al.,

vs. No. 47828.

Imbrie & Company.

To the Plaintiffs or their Attorneys:

You are notified that on the 8th day of March, 1921, we will present to the Superior Court of Fulton County, Georgia, a petition and bond to remove this case into the District Court of the United States for the Northern District of Georgia.

McDANIEL & BLACK,
Defendants' Attorneys.

Service acknowledged, copy received, this March 8th, 1921.

SPAULDING, MacDOUGALD & SIBLEY,
Plaintiff's Attorneys.

25 Know all men by these presents, that the undersigned, Imbrie & Company, a partnership composed of James Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Wm. Morris "Imbrie," Wm. Minot, and Waldo S. Kendall, as Principals, and J. L. McKibben, as Surety, are held and firmly bound unto J. H. Hilsman, doing business as J. H. Hilsman & Company, and the First Trust & Savings Corporation, in the sum of Five Hundred ($500) Dollars, for the payment of which the said parties bind themselves, their successors, heirs, administrators and executors, firmly by these presents.

The condition of this obligation is the following:

Whereas, the said obligee has pending in Fulton, Superior Court a suit against the said principals hereto, and the said Principals are about to file their petition to remove the same in the District Court of the United States for the Northern District of Georgia, together with this bond.

Now, should the said principals enter into the said District Court within thirty days from the filing of the said petition a certified copy of the record in such suit and pay all costs that may be awarded by the said District Court, if said District Court shall hold that such suit was wrongfully or improperly removed thereto and also shall appear and enter special bail, in such

suit if special bail was originally requisite therein, then this bond to be void; otherwise of full force and effect.

In witness whereof, the said parties have hereunto set their hands and affixed their seals, this .... day of March, 1921,

IMBRIE & COMPANY, (L. S.)
By E. R. BLACK,
Its Attorney at Law.
Principals.

J. L. McKIBBEN, (L. S.)
Surety.

26 Fulton Superior Court.

J. H. Hilsman & Company, et al.,
vs. No. 47828.
Imbrie & Company.

The defendants in this case having presented herewith their petition and bond to remove the same in the District Court of the United States for the Northern District of Georgia as provided by the statutes in such cases made and provided, this Court does hereby accept the said petition and bond and does hereby order that the said case shall be removed into the said District Court, and that this Court shall proceed no further in such suit.

This 8th day of March, 1921.

J. T. PENDLETON,
Judge S. C. A. C.

27 Fulton Superior Court.

J. H. Hilsman & Company, et al.,

vs. No. 47828.

Imbrie & Company.

In the above stated case under order of date March 3rd, 1921, Remsen P. King was appointed Temporary Receiver to take charge of and hold all assets of the defendant in this jurisdiction.

It being made to appear that defendants conducted a large business in the City of Atlanta and throughout the State of Georgia and that it will be necessary to post the books of the defendants and to list their securities and to perform other tasks through the medium of agents and employees, and that it will be necessary that the receiver have the advice of counsel and attorneys in the discharge of his duties.

It is hereby ordered that the receiver be directed and empowered to employ such agents and employees as may be necessary and to retain and employ such counsel as may be expedient, all for the proper conduct and discharge of his office as Receiver.

The Receiver is further ordered and directed to ascertain and list all assets of Defendants and insofar as he can ascertain and report liabilities to this Court, such report to be filed within one week from this date.

This 4th day of March, 1921.

GEO. L. BELL.,
Judge S. C. A. C.

Service of this intervention on the Receivers, John B. Johnston, Theodore G. Smith and Remsen P. King, acknowledged, copy waived.

This the 12th day of March, 1921.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Attys. for Receivers.

(The interventions included in the Transcript of Record from the Superior Court of Fulton County, Georgia, are omitted from this record.)

28 State of Georgia,
County of Fulton:

I, Arnold Broyles, Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of all the records in the case of "J. H. Hilsman & Co., et al., vs. Imbrie & Company, Number 47828, Fulton Superior Court," as appears of file and record in this office.

Witness my hand and seal of office this the 10th day of March, 1921.

(Seal) ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Georgia.

Filed March 11th, 1921.

29 ORDER CONSOLIDATING CASES.

In the District Court of the United States for the Northern District of Georgia.

Ancillary Bill.

Beaver Board Companies,
vs. No. 158.
Imbrie & Company.

Fulton Superior Court.

J. H. Hilsman & Co., et als.,
vs. No. 47828.
Imbrie & Company.

It appearing to the Court that there is pending a bill in equity ancillary to the bill filed in the District Court of the United States for the Southern District of New York entitled "Beaver Board Companies vs. Imbrie & Company," and that there has been removed from the Superior Court of Fulton County, Georgia, a certain bill in equity entitled "J. H. Hilsman & Company, et al., vs. Imbrie & Company."

Now, on motion of Spaulding, McDougald & Sibley, Attorneys for J. H. Hilsman & Company, and of Little, Powell, Smith & Goldstein, Attorneys for Theodore G. Smith and John B. Johnston, plaintiffs in the ancillary bill,

It is ordered and adjudged, that the cases above stated be and the same are hereby consolidated and will proceed as one case and the Clerk is directed to mark his docket accordingly.

Ordered further, that the time for pleading in the case of J. H. Hilsman & Company vs. Imbrie & Company, be, and the same is fixed as the 14th day of April, 1921.

That under this order of consolidation the rights of the attorneys for the petitioning creditors, and of the receiver under the State Court proceedings and of the attorneys for the receiver, Messrs. Mallet & Bell shall, under agreement of parties, be recognized and protected, and the same shall be considered as a part of the consolidated case.

In open Court this the 19 day of March, 1921.

SAM'L H. SIBLEY,
United States Judge

We consent to this order:

SPAULDING, MacDOUGALD & SIBLEY,
Attorneys for J. H. Hilsman & Company.
LITTLE, POWELL, SMITH & GOLDSTEIN,
MALLET & BELL,
Attorneys for Theodore G. Smith, John B. Johnston and Ramsen P. King, Receiver.
McDANIEL & BLACK,
Attorneys for Imbrie & Company.

Filed in Clerk's Office Mar. 19, 1921.

31 At a Stated Term of the District Court of the United States, in and for the Northern District of Georgia, Northern Division, held at the Court House, in the City of Atlanta, State of Georgia, on the 8th day of March, 1921.

Present: Hon. Sam'l H. Sibley, District Judge.

The Beaver Board Companies, Plaintiff,
against In Equity No. ....
James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners doing business under the firm name of Imbrie & Co., Defendants.

Upon the Bill of Complaint filed in the above entitled action in the United States District Court in and for the Southern District of New York, upon the certified Copy of the Order appointing Theodore G. Smith and John B. Johnston Receivers of the assets, estate and effects of the above named defendants, James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners doing business under the firm name of Imbrie & Co., and upon the original order appointing such Receivers, and filed in the District Court of the United States for the Southern District of New York, and upon the certificate of the Clerk of said Court of the filing and approval of the bond of the said Receivers, and upon reading and filing the petition of Theodore G. Smith and John B. Johnston, duly verified the 4th day of March, 1921, and on motion of Zalkin & Cohen and Little, Powell,
32 Smith & Goldstein, attorneys for the Receivers, it is

Ordered, adjudged and decreed, that Theodore G. Smith, John B. Johntson and Remsen P. King be and they hereby are appointed Ancillary Receivers of James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo S. Kendall and William Minot, co-partners doing business under the firm name of Imbrie & Co., the defendants above named, in and for the Northern District of Georgia, Northern Division, with all rights and powers to carry into force and effect the order of the original Court of Jurisdiction; and it is further

Ordered, adjudged and decreed, that the said Ancillary Receivers, Theodore G. Smith and John B. Johnston, furnish a bond in the sum of Ten Thousand Dollars and that Remsen P. King furnish bond in the sum of Ten Thousand Dollars for the faithful performance of their duties as such Ancillary Receivers; and it is further

Ordered, adjudged and decreed, that the defendants, and each of them, their agents and employees and all other persons, including creditors of the defendants, are hereby required and commanded forthwith to deliver all property of every nature belonging to the defendants to the said Ancillary Receivers; and it is further

Ordered, adjudged and decreed, that the said defendants, and each and every of their agents and employees, and all creditors of the defendants, and all Marshals, Sheriffs, Constables, and all Deputies and servants, and all other officers, and generally all persons, firms and corporations, whatsoever, are hereby enjoined from removing, transferring, disposing of, or attempting to remove, transfer, disposing of, or in any

way interfere with any of the properties of the defendants; or from doing anything whatever, or from doing anything of any nature to interfere with the possession and control of the said Ancillary Receivers of the property of the said defendants and it is
33 further

Ordered, adjudged and decreed that the said Ancillary Receivers shall have leave to apply to this Court for further orders and authority at any time hereafter as may be deemed by this Court proper, and shall comply with all orders of the Court of original jurisdiction.

This March 8, 1921.

SAM'L H. SIBLEY,
U. S. D. J.

Filed in Clerk's Office, U. S. District Court, March 8, 1921.

---

34 In the District Court of the United States for the Northern District of Georgia.

The Beaver Boards Companies, Plaintiffs,

vs. No. 158, In Equity.

James Imbrie, William Morris Imbrie, Roswell C. Tripp, Charles G. West, Jr., David T. Wells, Waldo D. Kendall, William Minor, Co-Partners doing busiess under the firm name of Imbrie & Company, Defendants.

Now come Little, Powell, Smith & Goldstein, attorneys for the Receivers, and bring to the attention of

the Court the fact that Remsen P. King, one of the Receivers appointed by this Court, died during the pendency of this case; that the other Receivers reside in New York and are not readily available;

That the sum of $10,000 is deposited in the Atlanta Trust Company to the credit of Theodore D. Smith, John B. Johnston and Remsen P. King, as Receivers.

That a Receiver should be appointed to succeed the said Remsen P. King, deceased.

Wherefore, they pray that this Court by its order do appoint some suitable person as resident Receiver in lieu of the said Remsen P. King; that said Receiver be vested with all the powers heretofore vested in said Remsen P. King; and he be further directed to examine the accounts of said Remsen P. King in order that a settlement may be made with the Estate of Remsen P. King and the surety on the bond discharged if his accounts are in order.

(Sd.) LITTLE, POWELL, SMITH & GOLDSTEIN,
Attorneys for Receivers.

35 The foregoing application coming on for consideration and the Court being advised that Remsen P. King died on the .... day of ....., 1922, and it being necessary that another Receiver be appointed in his stead,

Ordered and adjudged that E. L. Gilmore be and he is hereby appointed Receiver in said case, with all the rights and powers heretofore vested in said Rem-

sen P. King. Let him give bond in the sum of One Thousand ($1,000) Dollars for the faithful execution of this trust.

Said receiver is directed to examine the accounts of his deceased predecessor, and if the same are correct, to report to this Court, so that the estate of said Remsen P. King and his surety may be discharged.

In open Court this 3rd day of August, 1922.
SAM'L H. SIBLEY.

---

36 United States District Court, Northern Division, Northern District of Georgia.

The Beaver Board Companies,

vs. No. 158, In Equity.

Imbrie & Company.

To the Honorable, the District Judges of said Court:

The petition of I. S. Hozier respectfully shows:

1. That he is a citizen of Fulton County, Georgia.

2. That on February 21, 1921, petitioner gave an order to the Atlanta branch of Imbrie & Company to purchase for him forty-five (45) shares of American Woolen stock at $58.87½ per share.

3. This order was accepted by said Atlanta agency on said date, and petitioner was requested to make payment therefor, which petitioner did by check, said

check being in the sum of Two Thousand Six Hundred Fifty-Six and 13/100 ($2,656.13) Dollars, including the purchase price of said forty-five (45) shares, viz: Two Thousand, Six Hundred, Forty-Nine and 38/100 ($2,649.38) Dollars, and commission for making said purchase, Six and 75/100 ($6.75) Dollars.

37 4. Said payment was deposited by petitioner with said Atlanta agency of Imbrie & Company, in trust, for the specific purpose of being used by Imbrie & Company as brokers, representing petitioner in paying for said forty-five (45) shares of American Woolen stock, when purchased, and was so accepted by said Atlanta agency of Imbrie & Company.

5. The check given by petitioner to Imbrie & Company was, by said Atlanta agency, deposited in the Fulton National Bank of Atlanta to their credit, said deposit being made on February 23, 1921, and said check was collected by said Fulton National Bank.

6. Before said purchase had been made by Imbrie & Company, legal proceedings were instituted, resulting in a receivership for said Imbrie & Company and the ancillary receivership proceedings pending in this Honorable Court.

7. Said purchase was not made by Imbrie & Company for petitioner, as the result of which petitioner is entitled to the return of said Two Thousand, Six Hundred, Fifty-six and 13/100 ($2,656.13) Dollars from Imbrie & Company.

8. Petitioner shows that said amount was on deposit with the Fulton National Bank at the time that said receivership proceedings were instituted.

38 9. Petitioner avers, on information and belief that at or about the time of the institution of said receivership proceedings, Imbrie & Company, and particularly their Atlanta agency, were indebted to Fulton National Bank in a large sum of money, and that upon the institution of said receivership proceedings, said bank undertook to apply all the money on deposit in its bank to the credit of Imbrie & Company, to the payment of the indebtedness due by Imbrie & Company to said bank.

10. Petitioner further shows, on information and belief, that said Fulton National Bank has applied the above named money, the property of petitioner, to the payment of the debt of Imbrie & Company, and that said Bank was without legal authority so to do.

11. Petitioner avers that said fund, while on general deposit in said Fulton National Bank, was, in equity, the property of petitioner and not of Imbrie & Company, and that said Bank cannot, in equity, retain said money for the purpose of applying it as a credit on the indebtedness due it by Imbrie & Company.

12. Petitioner, therefore, avers that he is entitled to recover said money either from Imbrie & Company or from the Fulton National Bank.

39 Wherefore, petitioner prays:

(a) That he be allowed to file this intervention in said cause.

(b) That the Fulton National Bank of Atlanta be made a party hereto and be served with a copy of this intervention.

(c) That service be perfected on Imbrie & Company and the Receivers appointed by this Court, by serving their attorneys of record in this cause.

(d) Petitioner further prays that this Court render its decree, adjudicating that said fund is the property of petitioner; that it is impressed with the trust hereinabove specified; that the Fulton National Bank cannot retain said fund as a credit on the indebtedness due to it by Imbrie & Company, but that said Fulton National Bank shall pay said fund either to the Receivers appointed by this Court or to petitioner.

(e) Petitioner further prays for such other and further relief as to which, in justice and equity, he may be entitled.

BREWSTER, HOWELL & HEYMAN,
Petitioners' Attorneys.

Georgia,
Fulton County:

Personally appeared before the undersigned, a duly commissioned Notary Public, in and for said State and County, I. S. Hozier, who, upon oath, deposes and says that the statements of fact in the above and foregoing intervention are true, except where stated on
40 information and belief, and where so stated, he believes them to be true.

I. S. HOZIER.

Sworn to and subscribed before me, this 23 day of April, 1921.

C. D. FOREACRE,
Notary Public, State at Large, Georgia.

The above petition for intervention read and considered. Let the same be filed. Let service be perfected upon Imbrie & Company and the Receivers appointed by this Court, by serving their attorneys of record.

Let service be made upon the Fulton National Bank of Atlanta by serving a copy of said intervention upon a proper officer of said bank.

Let said Imbrie & Company, said Receivers, and the Fulton National Bank show cause before me, at 10 o'clock, A. M., on the 30 day of Apl., 1921, or as soon thereafter as a hearing can be had, why said intervention should not be allowed; why said Fulton National Bank of Atlanta should not be made a party thereto, and why petitioner should not be granted the relief prayed for in said intervention.

This April 23, 1921.

SAMUEL H. SIBLEY,
United States Judge.

41 Service of the above and foregoing intervention and the order of the Court issued thereon, is hereby acknowledged. All other service, including process or subpoena, is hereby waived.

This the 25 day of April, 1921.

IMBRIE & COMPANY,
By McDANIEL & BLACK,
Their Attorneys of Record.
THEODORE G. SMITH,
JOHN B. JOHNSTON,
REMSEN P. KING,
Ancillary Receivers.
MALLETT & BELL,
By LITTLE, POWELL, SMITH & GOLDSTEIN,
Their Attorney of Record.
FULTON NATIONAL BANK OF ATLANTA.
By RONALD RANSOM,
Its Attorneys of Record.

---

42 INTERVENTION OF I. S. HOZIER.

United States District Court, Northern Division,
Northern District of Georgia.

The Beaver Board Companies,
vs. No. 158, In Equity.
Imbrie & Company.

Now comes Intervener I. S. Hozier and, with leave of the Court, amends the intervention filed by him in said cause, and shows to the Court as follows:

13. That, subsequent to the filing of said intervention in this Honorable Court, Intervener, having been advised that all claims against Imbrie & Company must be filed not later than May 8, 1921, in the cause

pending in the United States District Court for the Southern District of New York, filed his claim in said Court. This claim was filed expressly subject to the rights of Intervener, as set forth in the within intervention in this Honorable Court.

14. In said claim Intervener set forth the facts in connection with the transaction between Intervener and the Atlanta agency of Imbrie & Company, substantially as set forth in this intervention. Intervener also set forth the fact that there was pending in this Court an ancillary proceeding against Imbrie & Company, being the consolidated cause of Hilsman & Company, of Atlanta, Georgia, against Imbrie & Company, instituted in the Superior Court of Fulton County, and removed to the Federal Court, and the cause instituted by the Receivers appointed by the United States District Court for the Southern District of New York. Intervener further set forth the fact that he had
43 filed his intervention in said cause in this Honorable Court, seeking to recover the money paid by him to the Altanta agency of Imbrie & Company as a trust fund.

15. Intervener further set forth that, "reserving all of his rights to have adjudicated his contention that said fund paid by him to the Atlanta agency of Imbrie & Company is a trust fund, to which he is specifically entitled, either from the Receivers in said ancillary proceedings or from the Fulton National Bank, and expressly subject to said contention"; that he made claim in said cause for the sum of Two Thousand, Six Hundred, Fifty-six and 13/100 ($2,656.13) Dollars, paid by him to the Atlanta agency of Imbrie & Company.

16. Intervener further in said proceeding set forth that, should it appear that said shares had been pur-

chased and otherwise appropriated by said Imbrie & Company, that he be allowed an amount equal to the highest value of said shares of stock, or that part of the same as may have been converted by said Imbrie & Company.

17. Intervener shows that, since he gave the order to purchase said shares to Imbrie & Company and paid them the purchase price thereof, said shares of stock have greatly increased in value and have been worth approximately One Thousand ($1,000.00) Dollars more than they were worth at the time Intervener gave said order.

18. Intervener avers that he is entitled either to have returned to him the money that he paid to the Atlanta agency of Imbrie & Company as a trust fund, or to recover a judgment against Imbrie & Company, said judgment to be a special lien on any funds in the hands of the Receivers appointed by this Court.

19. Intervener shows and avers that, at the time that this Honorable Court took charge of the administration of the affairs of the Atlanta agency of
44 Imbrie & Company, that the money placed by him in the custody of said Atlanta agency had not been used by said Atlanta agency, but had been placed on deposit with the Fulton National Bank, and that said money was charged with said trust, and could not properly be appropriated by said Fulton National Bank, and that the action of said Fulton National Bank in appropriating said money, as set forth in the original intervention, was a wrong against said Atlanta agency, as well as against your Intervener. Intervener shows that the Receivers appointed in said cause should either recover said money from said Fulton National

Bank, in order to return the same to Intervener, or should otherwise be required to pay the Intervener the amount of said money, without deductions out of such other funds as may be in their hands belonging to said estate.

Wherefore, Intervener, in addition to the prayers of said original intervention, prays this Court:

(f) For a judgment against said estate for the amount of Two Thousand, Six Hundred, Fifty-six and 13/100 ($2,656.13) Dollars said judgment to be a lien upon the money that should have been in the hands of said Atlanta agency at the time of the appointment of said Receivers, or in lieu thereof, said judgment to be a lien upon any funds belonging to said estate, now in, or that may hereafter come into, the possession of said Receivers.

(g) Or, should the Court hold that Intervener is not entitled to recover said fund as a trust fund from the Receivers or from the Fulton National Bank, that Intervener have judgment against said estate and the Receivers thereof for the full amount of said Two Thousand, Six Hundred, Fifty-six and 13/100 ($2,656.13) Dollars, to be paid out of any funds coming into the hands of said Receivers.

BREWSTER, HOWELL & HEYMAN,
Interveners' Attorneys.

45 Georgia,
Fulton County:

Personally appeared before the undersigned, a duly commissioned Notary Public, in and for said State and

County, I. S. Hozier, who, upon oath, deposes and says that the statements of fact in the above and foregoing amendment are true, execpt where stated on information and belief, and where so stated, he believes them to be true.

I. S. HOZIER.

Sworn to and subscribed before me, this the 30 day of May, 1921.

C. W. FOREACRE,
Notary Public, Georgia,
State at Large.

The above amendment allowed, subject to demurrer, and ordered filed. This the 31 day of May, 1921.

SAM'L H. SIBLEY,
United States Judge.

Service of the above amendment is hereby acknowledged.

....,
Attorneys for Imbrie & Company.

MALLETT & BELL,
LITTLE, POWELL, SMITH & GOLDSTEIN,
Attorneys for Receivers.

RONALD RANSOM,
Attorneys for Fulton National Bank, of Atlanta.

46 INTERVENTION OF I. S. HOZIER.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies,

vs. In Equity.

Imbrie & Company.

Nos. 158-159 (Consolidated Cases)

Now comes Fulton National Bank of Atlanta and before pleading to the intervention in this case interposes this its objection to being made a party to this case on said intervention and for such objection shows:

1. It appears on the face of said intervention that the controversy between the said Hozier and the Fulton National Bank is a separate, independent and distinct controversy which can and should be presented, if at all, in the shape of a distinct plenary suit by the said Hozier against the said bank and not through the form of an intervention in this case.

2. It appears on the face of the intervention that the said alleged claim against this defendant does not grow out of any proceedings in this case and is not connected with any property in the custody of this Court in connection with the said cause.

3. It appears on the face of the said intervention that the controversy between the said Hozier and the said bank is not germane to the matters involved in this cause and should not be litigated as a part thereof.

4. It appears on the face of the said intervention that the controversy between Hozier and the bank is not a controversy presenting the requisites of federal jurisdiction in that they are not citizens of different states and the amount involved is not in excess of $3,-
000.00, and it also appears that there is no
47 such possession of the res by this Court as to draw to it jurisdiction of such controversy, independently of the ordinary grounds of federal jurisdiction.

Wherefore, the said Fulton National Bank of Atlanta respectfully prays that the Court will deny the order prayed for in the said intervention to make the said bank a party hereto and that the said bank be hence dismissed with its reasonable costs.

RONALD RANSOM,
MARION SMITH,
Solicitors for Fulton National Bank.

---

48 ORDER MAKING FULTON NATIONAL BANK OF ATLANTA PARTY.

Upon hearing and consideration of the objections filed by Fulton National Bank of Atlanta to being made a party to this case, it is ordered

That said objections be and they and each of them are hereby overruled and disallowed.

It is further ordered that said Fulton National Bank of Atlanta be made, and it is hereby made, a party to said cause. Said Fulton National Bank of Atlanta is

hereby given 15 days from the date of this order within which to file pleadings or its answer in said cause.

This the 2 day of June, 1921.

SAM'L H. SIBLEY,
United States Judge.

Filed in Clerk's Office, Jun. 2, 1921.

---

49 ANSWER OF FULTON NATIONAL BANK OF ATLANTA TO THE INTERVENTION OF I. S. HOZIER.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies

vs. No. 158, In Equity.

Imbrie & Company.

The Fulton National Bank of Atlanta comes now and without waiving its objection to being made a party herein, but expressly reserving the same, and reserving its exception to the order of the Court overruling the said objection, and reserving and excepting the jurisdiction of the Court in this matter, answers the said amended intervention as follows:

1. Respondent in this answer sets up the following defenses in point of law arising upon the face of the said amended intervention, to-wit:

(a) The said amended intervention is insufficient to set out any valid cause of action in equity against this respondent.

(b) The said amended intervention does not set out sufficient facts to entitle the Intervener to recover of this respondent the said sum or fund referred to in the said amended intervention.

(c) The said amended intervention does not set out sufficient facts to entitle the said Intervener to any of the relief prayed for against this respondent, or to any relief against this respondent.

2. Reserving said defenses in point of law, the respondent now answers the said amended intervention as follows:

50 3. Paragraph 1 is admitted.

4. Respondent has not sufficient information to either admit or deny paragraph 2.

5. Respondent has not sufficient information to admit or deny paragraph 3.

6. Answering paragraph 4, respondent says that any payment made by the Intervener to Imbrie & Company, on account of purchase of stock as set out in said paragraph, would not be a deposit in trust of said amount in the sense that Imbrie & Company would hold the same as trustees for the intervener. Respondent says that there are not sufficient facts set out or shown in the amended intervention to make such a payment otherwise than a mere advance payment on account of the purchase of said securities, which under

ordinary commercial practice and usages would not constitute a deposit of the funds in trust, but would constitute a mere advance payment pending the delivery of the securities. The relation of the parties would be that of debtor and creditor, and not that of trustee and cestui qui trust, and respondent says that this in fact was the relation between the parties named in said amended intervention.

7. In response to paragraph 5, this respondent says that it is true that Imbrie & Company deposited a check of interveners' on or about the date named with the Fulton National Bank, which Bank afterwards collected the proceeds of said check. The respondent, however, says that the funds arising from said check passed into the account of Imbrie & Company as an open credit to Imbrie & Company. Respondent not only denies that there was any special trust imposed on said fund, but further says that it had no notice whatever of anything connected with the said check except that it purported to be the property of Imbrie & Company, and was normally deposited to their account in the ordinary course of banking business.

51 8. Answering paragraph 6, respondent says that it is true legal proceedings were instituted against Imbrie & Company and a receivership had. It knows nothing, whatever, about the purchase by Imbrie & Company of anything for the Intervener's account.

9. Answering paragraph 7, respondent says that it knows nothing about whether a purchase was made by Imbrie & Company, or what rights the Intervener may have against Imbrie & Company, but it denies that it has any rights against this respondent.

10. Answering paragraph 8, respondent says that at the time of the failure of Imbrie & Company, the said Company had on deposit with this respondent several thousand dollars. It was an ordinary current balance made up of various deposits from time to time, against which various checks had been paid from time to time, being an ordinary, active commercial account. The Intervener's check had at one time gone into this account, increasing the credit to Imbrie & Company. Checks had been paid out of said account after that time, and other deposits made. It is wholly impossible for anyone to say that the Intervener's check made up any part of the balance at the date of Imbrie & Company's failure.

11. Responding to paragraph 9, said Fulton National Bank says that at the date of Imbrie & Company's failure, Imbrie & Company owed the Fulton National Bank of Atlanta an amount in excess of the sum to their credit. Respondent charged off against said notes of Imbrie & Company, the bank balance to the credit of Imbrie & Company, which was not enough by a large margin to liquidate the said notes. Respondent submits that in so doing it was acting fully within its legal and equitable right.

12. Responding to paragraph 10, the respondent says that the facts in said paragraph have already been answered. The legal conclusion in said paragraph is unfounded and directly contrary to established rules of law.

52 13. Paragraph 11 states certain conclusions which respondent says are incorrect. The facts with regard to said deposit have already been stated in this answer. Respondent therefore denies paragraph 11.

14. Paragraph 12 of the amended intervention is a mere legal conclusion which is also denied.

15. Paragraphs 13, 14, 15 and 16 of the intervention set up by way of an amendment, are merely a recital of certain proceedings, which the Intervener alleges he has taken in the District Court of the United States for the Southern District of New York, in the main receivership cause of Imbrie & Company. Respondent does not know of its own information whether these allegations are correct, and therefore can neither admit nor deny the same, but says that said allegations are wholly immaterial.

16. According to respondent's information and belief, paragraph 17 of the amended intervention is untrue. Respondent denies that the said shares of stock have increased at all, but like all other shares of stock have been rapidly falling in value.

17. Paragraph 18 of the amended intervention states merely legal conclusions, which this respondent denies to be correct.

18. The allegations of paragraph 19 of the amended intervention are denied. Most of the allegations are a re-statement of the intervener's legal conclusions, which this respondent also denies. The facts with regard to the said deposit have already been fully stated in this answer.

19. Further answering, the respondent shows that for the reasons herein set out, the said check of the intervener was not held by Imbrie & Company in trust, but was the property of Imbrie & Company. The delivery of the said money imposed certain obligations of

Imbrie & Company to the Intervener, but did not impress a trust on the fund. Respondent further
53 shows that it received the deposit from Imbrie & Company in the normal and ordinary course of business, and passed the same to the credit of Imbrie & Company as an open bank account. This being an active bank account and contantly changing, it is impossible to say what deposits made up the balance that existed at the date of Imbrie & Company's failure. Respondent further says that because of the indebtedness of Imbrie & Company to it, it was in law and equity justified in charging off the balance against the debts of Imbrie & Company, and this respondent denies that the Intervener is entitled to any relief against this respondent whatsoever.

Wherefore, respondent prays that the amended intervention be dismissed, and that it have judgment against the Intervener for its reasonable costs in this behalf incurred.

RONALD RAMSOM,
LITTLE, POWELL, SMITH & GOLDSTEIN,
MARION SMITH,
Solicitors for Fulton National Bank of Atlanta, Defendant in said Intervention.

54 AMENDMENT TO THE ANSWER OF THE FULTON NATIONAL BANK TO INTERVENTION OF I. S. HOZIER.

In the District Court of the United States, for the Northern District of Georgia.

Beaver Board Cmpanies
vs. No. 158, In Equity.
Imbrie & Company.

Comes now The Fulton National Bank and subject to the reservations heretofore made in said answer amends the said answer by adding thereto the following:

1.

For a further defense in addition to the matters heretofore recited the said respondent shows:

2.

At the time of the transactions involved in this controversy Imbrie & Company was borrowing money from The Fulton National Bank of Atlanta, and was at the time of the alleged deposit of the money alleged to be that of the intervener indebted to this respondent in the sum of thirty-two thousand, eight hundred and no/100 ($32,800) dollars, which said indebtedness consisted of a demand note of twenty-five thousand ($25,000) dollars, and another note of seven thousand, eight hundred ($7,800) dollars.

3.

Said indebtedness had arisen and had been created under an understanding between this respondent and

Imbrie & Company that Imbrie & Company would at all times maintain with this respondent subject to being charged off against the said loan a balance of at least one-fourth of the amount that Imbrie & Company might at any time be indebted to this respondent. For this reason the larger part of the said indebtedness, to-wit: twenty-five thousand ($25,000) dollars was placed in the shape of a demand note subject to call at any time. The collateral held by this respondent was not regarded as being fully adequate for said loan, and the balance was understood to be additional security for the said loan, and the arrangement by which it was understood that this respondent would exercise its right to call said loan should the balance fall below one-fourth of the total indebtedness of Imbrie & Company, was a part of the transaction out of which the said indebtedness of Imbrie & Company arose, and was the basis on which it was created and continued and note called by this respondent.

4.

The account of Imbrie & Company with this respondent was under constant supervision and scrutiny to see that this balance was maintained, it being the purpose of this respondent, pursuant to its understanding with Imbrie & Company, that should the said Imbrie & Company attempt to draw its balance below the said amount of one-fourth of the total indebtedness of Imbrie & Company to this respondent, the said respondent would immediately exercise its right to demand payment of the said twenty-five thousand ($25,000) dollar note, and charge off the balance so held by this respondent against the said note, and respondent did not demand payment of said note, and did not prior to the receivership charge

off the balance of Imbrie & Company against its said note for the reason that the balance maintained by Imbrie & Company with this respondent was always one-fourth of its indebtedness, pursuant to its said agreement and understanding.

5.

Respondent further shows that one-fourth of the said indebtedness amounted to eight thousand, two
56 hundred ($8,200) dollars, and that this was the minimum sum below which Imbrie & Company could not reduce its deposit without having the said loan called and demand for payment made, pursuant to its said understanding.

6.

At the time of the deposit of the check of two thousand, six hundred and fifty-six and 13/100 ($2656.13) dollars respondent had no notice or information of any facts or circumstances showing any claim or equities against the said check, nor had respondent any reason to believe that the funds represented by said check were not the funds of Imbrie & Company, nor was respondent put upon any notice or inquiry with regard hereto.

7.

Respondent further shows that on February 23, after the deposit of said check, there was in the bank account of Imbrie & Company with this respondent a balance of only ten thousand, five hundred and twelve and 10/100 ($10,512.10) dollars. Thereafter the balance on various occasions was around fourteen thousand ($14,000) dollars and other similar amounts. Respondent shows that there are other parties claiming alleged trusts in funds

which had been deposited to this account, and that on various dates after the deposit of the intervener's check the balance of Imbrie & Company with respondent, but for the deposits of the various funds now claimed to be in equity the property of various interveners, would have been less than the agreed amount, and on many occasions would have stood as an overdraft.

8.

Respondent shows that it has acted and relied upon the apparent credit to the account of Imbrie &
57 Company created by the said deposit which the intervener now claims, in that it has continued the loans of Imbrie & Company which it had a right to call and demand for payment, and which it would have called and demanded for payment but for the said apparent credit to the account of Imbrie & Company, and in that it has paid checks of Imbrie & Company which reduced the said balance of Imbrie & Company below the amount it had agreed to carry, and in that respondent has carried the said demand note without demanding payment of the same, without charging off the balance of Imbrie & Company against the same, as it was not required to do, and as it would not have done but for the apparent credit to the account of Imbrie & Company.

8.

In continuing and carrying the said demand note the respondent acted and relied upon the apparent credit to the account of Imbrie & Company, it having been expressly understood and agreed that a part of the security of this respondent for the said loan should consist of the balance with this respondent which Imbrie & Company

had agreed and contracted to carry as heretofore more fully set out.

10.

Relying upon the said balance, respondent permitted the said demand note to be carried with this respondent until the failure and receivership of Imbrie & Company, which respondent would not have done but for its reliance upon the said balance, and it is, therefore, impossible to restore the status of respondent to what it would have been and to the rights that it could have exercised had it not acted upon the faith of said deposit.

58

11.

Respondent, therefore, avers that it has changed its position in reliance upon the said deposit as it had a right to do under its understanding and agreement with Imbrie & Company, and that its equity to charge any funds remaining with this respondent upon the failure of Imbrie & Company against the indebtedness of Imbrie & Company is superior to the alleged equity of the intervener in this case. Respondent denies that the intervener has any equity in regard to the said fund, but avers further that if he had any, it was a secret equity wholly unknown to this respondent, and that having permitted Imbrie & Company to deal with the said funds as if they were its own, and respondent having relied upon the apparent ownership of said funds by Imbrie & Company, as heretofore set out, respondent alleges that the said intervener should not now be permitted to assert the said secret equity in him as against the said fund.

12.

Respondent further shows that the substance of its arrangement with Imbrie & Company was an equitable pledge of at least eight thousand, two hundred ($8,200) dollars of Imbrie's bank account to this respondent, as security for its loans, and created in equity a lien or charge against that much of said bank account which the said Imbrie & Company were not authorized to withdraw. Respondent, therefore, says that when Imbrie & Company checked its balance down to the sums heretofore set out in the seventh paragraph of this amendment the presumption would arise that the money left in said account was the money which Imbrie & Company had contracted to leave there as further security for the respondent's claims, and that the proper presumption of law would be that the funds withdrawn from the said account were funds which Imbrie & Company could withdraw without violating its agreement with this respondent, to leave at all times at least eight thousand,
59 two hundred ($8,200) dollars of its funds in the said account and on deposit with this respondent.

13.

Respondent further shows that whenever the said balance was reduced to the amount hereinbefore indicated, the Court should presume that eight thousand, two hundred dollars thereof remaining at any time was the amount which Imbrie & Company had pledged to keep on deposit with this respondent, and that as the excess over said amount at various times was far less than the amounts claimed by the various interveners, it is impossible for the said interveners, or any of them, to attempt to trace and identify their various funds.

Wherefore, this respondent prays that it be hence discharged with its reasonable costs.

LITTLE, POWELL, SMITH
& GOLDSTEIN,
Solicitors for Respondent.

MARION SMITH,
Of Counsel.

Amendment allowed and ordered filed, subject to objections or exceptions.

This the 3 day of April, 1922.

SAM'L H. SIBLEY,
U. S. Judge.

---

60 ORDER REFERRING INTERVENTIONS TO STANDING MASTER.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies

vs. No. 158, In Equity.

Imbrie & Company.

It appearing to the Court that certain interventions are pending in this cause and that the same involve complicated questions of fact and of law, and that said interventions are of the kind and character usually referred to a Special Master in equity causes,

It is ordered and adjudged that the interventions of Stephen A. Lynch, Moses Frank, I. S. Hosier, W. I. W. Pitts (3 interventions), J. G. Ison, S. J. Hayles and Harry Pfeffer, be and the same are hereby referred to the Honorable Cam Dorsey, Standing Master, appointed by this Court, with full power to allow amendments and pass on all questions of law.

Said Standing Master is directed to give the parties at interest notice of the time and place of hearing of the said interventions, and after hearing such evidence as the parties may offer, to make his report to this Court showing his findings of fact and his conclusions of law. The Standing Master is directed to make separate findings in each of the cases in which the Fulton National Bank is a party. He is further directed to give precedence to the interventions filed by Stephen A. Lynch, and to make his report on this intervention as soon as possible.

This reference is made without prejudice to the rights of any of the parties. The parties may, if they desire, renew the objections they have heretofore made in this Court before the Standing Master, in which event the Standing Master is directed to report his conclusions of law regarding same.

In open Court this the 20 day of September,
61 1921.

SAM'L H. SIBLEY,
United States Judge.

62 REPORT OF CAM D. DORSEY AS STANDING MASTER IN CHANCERY.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies
vs. No. 158, In Equity.
Imbrie & Company.

Intervention of I. S. Hozier.

To the District Court of the United States for the Northern District of Georgia and to the Honorable Samuel H. Sibley, Judge of said Court:

Pursuant to reference in cause above stated the undersigned, as Standing Master in Chancery, submits the following report:

(1) Pleadings and Issues.

The pleadings filed and considered in this cause are (1) the original and amended intervention of I. S. Hozier, (2) objections to jurisdiction filed by Fulton National Bank, (3) answer and amended answer of Fulton National Bank, (4) answer and amended answer of Receivers. Said pleadings are submitted with this report.

Briefly stated, intervener alleges that on February 21st, 1921, he ordered the Atlanta branch of Imbrie & Company to purchase for him 45 shares of American Woolen stock at $58.87½ per share and deposited with Imbrie & Company to make payment therefor his check for $2656.13; that said check was deposited by Imbrie & Company in its bank account at the Fulton National

Bank, Atlanta, Ga., on February 23rd, 1921, and the proceeds of said check collected by said bank; that before said stock had been purchased legal proceedings were instituted against Imbrie & Company in the
63 District Court of the United States for Southern District of New York resulting in a receivership for Imbrie & Company in that jurisdiction and later the appointment of Receivers in this jurisdiction under ancillary proceedings filed in this Court; that the stock in question was not purchased by Imbrie & Company; that upon the institution of said receivership proceedings, the Fulton National Bank undertook to apply all money on deposit in said bank to the credit of Imbrie & Company, to the payment of indebtedness due the bank by Imbrie & Company; that the bank was, as against intervener, without authority to retain said money for the purpose of appyling it as a credit on the indebtedness due it by Imbrie & Company; that intervener is entitled to recover said money from Imbrie & Company or the Fulton National Bank, and prays that this Court adjudicate that said fund was a trust fund and the property of intervener and that the Fulton National Bank cannot retain said fund, but must pay same either to Receivers appointed by this Court or to intervener.

By amendment intervener alleges that pursuant to order of the United States District Court for the Southern District of New York he filed his claim in said Court, making same expressly subject to the rights of intervener as set forth in intervention filed in this Honorable Court; that he is entitled to have the money which he paid Imbrie & Company as a trust fund returned to him or recover judgment against Imbrie & Company, said judgment to be a special lien on any funds in the hands of the Receivers appointed by this Court, and prays judgment accordingly.

The Fulton National Bank objects to the jurisdiction of this Court upon the several grounds fully set forth in "Objections to Intervention of I. S. Hozier" filed April 30th, 1921, attached hereto and submitted with this report.

64 Reserving its objections to the jurisdiction of this Court, the Fulton National Bank answers that it appears from the face of the intervention that Hozier is not entitled to recover against the bank; that the payment aforesaid by intervener to Imbrie & Company did not make Imbrie & Company trustees for intervener; that said payment was merely an advance on account of the purchase of stock and the relation between Hozier and Imbrie & Company was merely that of a debtor and creditor; that the deposit of said check by Imbrie & Company in the Fulton National Bank passed into the account of Imbrie & Company as an open credit to Imbrie & Company and no special trust was imposed on said fund; that the Fulton National Bank had no notice whatever of anything connected with said check, except that it purported to be the property of Imbrie & Company and was deposited to the account of Imbrie & Company in the ordinary course of banking business; that at the time of its failure Imbrie & Company had on deposit with the Fulton National Bank several thousand dollars, the same being an ordinary commercial account resulting from various deposits made from time to time; that at the date of said failure Imbrie & Company owed the Fulton National Bank an amount in excess of the sum to its credit and the bank charged up against the said notes of Imbrie & Company, the bank balance to the credit of Imbrie & Company in said bank.

By amendment Fulton National Bank alleges that at the time of the transactions involved in this controversy Imbrie & Company was borrowing money from the Fulton National Bank and was at the time of the deposit of the money alleged to be that of intervener, indebted to the bank in the sum of $32,800, consisting of a demand note of $25,000.00 and another note of $7800.00, which said indebtedness had been created under an understanding between the bank and Imbrie & Company
65 that Imbrie & Company would at all times maintain with the bank, subject to being charged off against said loan, a balance of at least one-fifth of the amount Imbrie & Company might at any time be indebted to the bank; that the bank did not regard the collateral for said loans as adequate protection and relied upon the above agreement in creating and continuing said loan until the failure and receivership of Imbrie & Company; that it is impossible to restore the status of the bank to what it would have been and to the rights it would have execised had it not acted upon the faith of the deposit which intervener claims was a trust fund belonging to him.

The answer of Receivers denies the existence of any trust relation between Hozier and Imbrie & Company in the delivery of said check and denies that the proceeds of said check as deposited in the Fulton National Bank were impressed with a trust in favor of intervener; alleges that intervener has filed his intervention in the main case pending in New York and that this Court is without jurisdiction in this cause and the intervener is, in no event, entitled to any special lien or judgment superior to the claim of any other interveners in this case.

Receivers answer as amended admits that intervener is entitled to a judgment against Imbrie & Company for

the amount claimed in the main case and in the District Court of the United States for the Southern District of New York but denies that intervener is entitled to any judgment at all in this jurisdiction.

Under the pleadings of the parties to this litigation and their admissions in open Court as shown by depositions attached to this report, the issues in this cause are:

(1) Has this Court jurisdiction to render judgment against the Fulton National Bank in this intervention or judgment against Receivers in this District.

(2) Was the deposit of $2656.13 made by intervener with Imbrie & Company on February 21st, 1921,
66 the deposit of a trust fund which belonged to Intervener.

(3) Is Intervener entitled to follow said check or the proceeds therefrom as a trust fund into the hands of the Fulton National Bank after said check was deposited on February 23rd, 1921, by Imbrie & Company in its general bank account at the Fulton National Bank.

(4) Did the Fulton National Bank have notice or was the bank chargeable with notice of the claim of Hozier in the check deposited by Imbrie & Company on February 23rd, 1921.

(5) If the bank did not have notice and was not chargeable with notice of Hozier's interest or claim in said check, was the bank entitled at the date of said receivership proceedings to set off against the indebtedness of the bank to Imbrie & Company the indebtedness of Imbrie & Company to the bank, or is it necessary for the bank to show in addition to lack of notice, that it ex-

tended credit to Imbrie & Company on faith of the deposit of said check by Imbrie & Company on February 23rd, 1921.

(6) Did the bank extend credit to Imbrie & Company on faith of the deposit of said check by Imbrie & Company.

(2) Evidence.

The evidence submitted, considered in this cause and filed as a part of this report, is as follows:

(1) Depositions of April 10th, 1922.

(2) Depositions of April 11th, 1922, with five exhibits attached thereto.

(3) Depositions of April 12th, 1922.

(3) Objections to Evidence and Rulings Thereon.

Master's rulings on all objections to evidence have been entered in the record at the point where the evidence in question appears.

67 (4) Findings of Fact.

(1) Imbrie & Company were brokers and traders in stocks and bonds and other securities, having their principal office in New York and maintaining a branch office in Atlanta during the latter part of 1920 and early part of 1921.

(2) The Atlanta branch had a general bank account in the Fulton National Bank and on October 1st, 1920,

became indebted to the bank on a demand note for $25,000.00 at which time Imbrie & Company agreed to keep a balance on account with the bank equal to one-fifth of its indebtedness to the bank with the understanding that if and when the balance of said account should fall below this requirement, said note would be called by the bank.

(3) In January, 1921, the bank made an additional loan to Imbrie & Company (evidenced by note of $7800.00), and notified Imbrie & Company that if its future balance should fall below one-fifth of the total indebtedness the loans would be called and Imbrie & Company (through its Atlanta Manager) agreed to keep, subject to being charged off against its said loans from the bank a balance on account with the bank equal to the requirement.

(4) On February 21st, 1921, intervener placed an order with Imbrie & Company for certain stock and delivered his check of $2556.13 to Imbrie & Company to pay for same.

(5) Imbrie & Company deposited the check in question to its general account in the Fulton National Bank on February 23rd, 1921, but never purchased and delivered the stock to intervener.

(6) The bank collected the check and credited the proceeds to the account of Imbrie & Company.

(7) The bank balance of Imbrie & Company in the Fulton National Bank did not, between February 23rd, and March 3rd, 1921, fall below an amount equal to one-fifth of the indebtedness due the bank by Imbrie & Com-

pany or within $2656.13 of the minimum amount which Imbrie & Company had agreed to maintain as its balance for the protection of the bank as set forth
68 above.

(8) On March 23rd, 1921, legal proceedings were instituted in the District Court of the United States for the Southern District of New York, resulting in the appointment of Receivers for Imbrie & Company there and subsequently local Receivers for Imbrie & Company were appointed under ancillary proceedings in this jurisdiction.

(9) On March 3rd, 1921, Imbrie & Company's balance in the Fulton National Bank was $27,950.65 and on that date Imbrie & Company were indebted to the bank $32,800.00 covered by the $25,000.00 demand note and the $7800.00 note due April 1st, 1921, and the bank applied on that date the Imbrie & Company balance on the said indebtedness of Imbrie & Company to the bank.

(10) The bank did not on February 23rd, 1921, or between that date and March 3rd, 1921, have actual notice and was not chargeable with notice that Hozier had or claimed to have title to or interest in said check of $2656.13 which Imbrie & Company deposited in the bank on February 23rd, 1921.

(11) The Fulton National Bank did not on February 23rd, 1921, or thereafter extend credit to Imbrie & Company or act or refrain from acting on faith of the deposit of said check of $2656.13 as the property of Imbrie & Company.

(The following additional findings of fact upon request of Counsel for the Bank.)

(12) On March 3d, 1921, Imbrie & Company was insolvent and could not pay its debts.

(13) The $7800 note of Imbrie & Company above referred to contained the following provision, to-wit:

"And do hereby give the holder a lien for this note and all said demands upon all property left with said holder and upon any balance of deposit account of the undersigned with said holder, with authority to at any time charge any or all of said demands against the deposit account on the books of the holder hereof, if there be such an account."

69 Conclusions of Law.

(1) This Court has jurisdiction of this intervention as against the Fulton National Bank as party defendant and the objections to the intervention filed by the bank should be overruled.

Equity Rule 37;
Porter v. Sabine, 149 U. S. 473 (3);
White v. Ewing, 159 U. S. 36;
First brief for Intervener Hozier, pages 39-45 inclusive, and particularly pages 43, 44 and 45;
Second brief for Intervener Hozier and especially pages 9 and 10 and 17 to 20 inclusive.

(2) Intervener deposited with Imbrie & Company and Imbrie & Company received from Intervener said check of $2656.13 as a trust fund to be used for payment of

stock which Imbrie & Company was to purchase for Intervener.

Nat'l Bank v. Life Ins. Co., 104 U. S. 54;
In Re: Lindsley & Co., 185 Fed. 684 (1);
In Re: Brown & Co., 189 Fed. 440;
Brief for Intervener Frank, pages 4 and 5.

(3) The depositing of said check of $2656.13 by Imbrie & Company in its general bank account in the Fulton National Bank did not change the trust character of said check and proceeds therefrom and intervener is entitled as between intervener and Imbrie & Company, to follow said trust property into the bank account of Imbrie & Company.

Nat'l Bank v. Life Ins. Co., 104 U. S. 54;
Union Stock Yards v. Gillespie, 137 U. S. 411;
Brief of Intervener Frank, page 6.
Shotwell v. The Bank, 1915 (A) L. R. A. 715;

70 (4) The deposit of said check by Imbrie & Company in the Fulton National Bank created the relationship of debtor and creditor between the bank and Imbrie & Company in the amount of said check.

First brief for Intervener Hozier, pages 7 to 13 inclusive;
Brief for Intervener Frank, pages 7, 8 and 9.

(5) Following said deposit Imbrie & Company became the legal and intervener the equitable owner of said chose in action, namely, the indebtedness of the bank to Imbrie & Company in the sum of $2656.13 the amount of said deposit.

First brief of Intervener Hozier, pages 7 to 13 inclusive; Brief for Intervener Frank, pages 7, 8 and 9.

(6) The balance of Imbrie & Company in the Fulton National Bank on March 3rd, 1921, to-wit, $27950.05 included the deposit of intervener's check by Imbrie & Company on February 23, 1921.

Authorities cited page 7 first brief for Intervener Hozier; Authorities cited pages 6 and 7 for Intervener Frank.

(7) The bank is not, under the evidence introduced, chargeable in law with notice of the claim of Intervener in said check or the proceeds therefrom.

First brief for Bank, pages 7 to 17 inclusive.

(8) The bank, not having extended any new credit upon faith of the deposit by Imbrie & Company of the trust fund belonging to intervener, was not entitled to set-off the indebtedness of the bank to Imbrie & Company created by the deposit of said check of $2656.13 against the indebtedness of Imbrie & Company to the bank represented by the said notes aggregating $32,800.00.

71 Bank of Metropolis vs. New England Bank, 6 How. 212; Bank of Metropolis vs. New England Bank, 1 How. 234; Wilson vs. Smith, 3 How. 763; Shotwell vs. Sioux Falls Bank 1915 (A) L. R. A. p 715; Note in 13 A. L. R. p 330; Note in 1915 (A) L. R. A. 721 etc.

(9) Intervener herein is entitled to recover of the bank $2656.13 the amount of said check and is entitled to judgment therefor in this suit—the expenses incidental to this intervention being paid in such manner and amounts as this Honorable Court may see fit to tax the same against the several parties.

There is no conflict in the evidence in this case but there is a difference of opinion as to the conclusion which should be drawn from the facts proven or admitted.

Intervener contends that the bank had actual notice or was chargeable with notice of intervener's interest in the check which Imbrie & Company deposited in the bank. Master does not believe that the bank had actual notice and does not believe that under the evidence submitted the bank was chargeable in law with notice of the interest of intervener in the check in question. The brief of counsel for the bank on the question is convincing. The cases of Central National Bank vs. Conn. Mutual Life Ins. Co. (104 U. S. 54) and Union Stock yards vs. Gillespie (137 U. S. 411) appear to represent the limit to which the courts have gone in holding a bank chargeable with notice and these cases do not, in Master's opinion, justify a finding that the bank was chargeable with notice under the circumstances of this case.

The bank and the Receivers contend in their pleadings that no trust relation existed between intervener and Imbrie & Company and that intervener is not entitled to follow the deposit in question as a trust fund into the bank account of Imbrie & Company, but no argument was made or authorities submited in support of these contentions. The authorities cited in briefs for interveners and under the conclusion of law appear conclusive on these questions.

There is a sharp conflict as to the law on the question of jurisdiction and as to whether or not it is necessary for the bank, if it is to prevail in this case, to show, in addition to lack of notice, the extension of credit upon faith of the deposit in question by Imbrie & Company.

73 The Receivers did not take physical possession of the "property" intervener seeks to recover, but it would seem that whatever rights Imbrie & Company or intervener had in the chose in action, namely, the bank account of Imbrie & Company in the bank on March 3rd, 1921, passed to the Receivers and that this Court should have jurisdiction to determine the respective rights of the several parties in reference thereto.

Master's conclusion that this Court should retain jurisdiction of this intervention is based on the authorities cited under the conclusion of law, argument and citations of counsel for intervener and in addition the following cases, to-wit:

Blake vs. Pine Co. 76 Fed. 624 (1) pp 635-6; Lamb vs. Ewing, 54 Fed. pp 272-3; Farmers Trust Co. vs. Houston, 44 Fed. 115-6; Krippendorf vs. Hyde, 110 U. S. 276; p 283 (28 Fed. 148); Sioux City Co. vs Trust Co., 82 Fed. p 126; Oklahoma vs. Texas, U. S. Supreme Ct. Adv. Sheets of June 1st, 1922, p 444. Peoples vs. Miles, 76 Fed. 252 (1).

Intervener claims the right to recover (even if the bank did not have notice) under the "Federal Equity Rule" as defined in the Bank of Metropolis case (6 How. 212) and Wilson vs. Smith (3 How 763). Counsel for the bank claim that no such rule exists; that Wilson vs. Smith is not applicable and that both cases above referred to have been overruled by the two later decisions of Central National Bank vs. Life Ins. Co. (104 U. S. 54) and Union Stockyards vs. Gillespie (137 U. S. 411).

In Master's opinion the Central Bank and Gillespie cases do not overrule the Bank of Metropolis and Wilson vs. Smith cases. The later cases decide that a bank

with notice cannot prevail against the equitable owner of a deposit but do not decide that a bank which has not extended credit upon faith of the deposit can retain the deposit or proceeds therefrom as against the true owner. The equitable principle established in the Bank of Metropolis and Wilson cases is applicable to and, in
74 Master's opinion, controls the pending suit. Master's conclusion on this question is based on the authorities cited under the conclusion of law and the following cases, to-wit:

First brief for Intervener Hozier, page 7 as to Federal rules of construction and pages 21 to 33 inclusive; Oliver vs. Williams, 3 How 333; Price vs. Elmbank, 72 Fed. 617; 3 R. C. L. pp 584, 586 and 587; Randall vs Curtis, 12 A. L. R. 1040 (4); U. S. Nat'l. Bk. vs. Amalgamated Co. 179. p 720; Amalgamated Co. vs. U. S. Nat'l. Bank, 187 Fed. 748-9; Vickery vs. State Savings Ass'n., 21 Fed. 773; Garrison vs. Union Trust Co. 70 L. R. A. 619-20; Carroll vs. Exchange Bk. 4 S. E. 440; Davis vs. Panhandle Bank, 29 S. W. 926; Wingfield Bank vs. McWilliams, 60 Pac. 229 and 231; Note in 12 A. L. R. p 1058.

Master files with this report, for the convenience of the Court, the several briefs of counsel marked and identified as indicated in the citations under the conclusions of law. Several law questions are in dispute under the pleadings but were not questioned in argument of counsel or briefs submitted, and as to these conclusions of law the Master has cited, in some instances, only the brief of counsel for interveners.

Respectfully submitted,

CAM D. DORSEY,
Standing Master in Chancery.

75 EXCEPTIONS OF FULTON NATIONAL BANK OF ATLANTA TO THE REPORT OF THE STANDING MASTER.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies,

vs. No. 158 In Equity.

Imbrie & Company.

Intervention of I. S. Hozier.

And now comes the Fulton National Bank of Atlanta, and excepts to the report of Cam D. Dorsey, Esq., Standing Master, filed in this cause on the 4th day of August, 1922, and for cause for exception shows:

1. The Master has in said report stated, found and certified as a first conclusion of law that the Court has jurisdiction of this intervention as against the Fulton National Bank of Atlanta as a party defendant and that the objections to the jurisdiction and to being made a party filed by the Bank should be overruled; whereas the Master ought to have found that the Court did not have jurisdiction of the intervention against the Bank and that the Court should not make, or have made, the Bank a party, and that the objections filed by the Bank were each and all of them well founded and should have been sustained.

2. The Master has found in his fifth conclusion of law and has reported, stated and certified to the Court that

the intervener was the equitable owner of the chose in action represented by Two Thousand Six Hundred and Fifty-six & 13/100 ($2,656.13) Dollars of the indebtedness of the Bank to Imbrie & Company shown by its
76 deposit; whereas the Master should have found as a qualification thereof, that whatever equities the Bank held against Imbrie & Company were superior to the equitable rights of the intervener as against said deposit, since the Master has found and certified that the Bank was not chargeable with notice of any rights of the said intervener.

3. The Master has found in his eighth conclusion of law, and has so reported, stated, and certified that the Bank was not entitled, as against the intervener, to charge off said deposit against the indebtedness of Imbrie & Company; whereas the Master should have found that since the Bank was not, under his findings, chargeable with notice of intervener's claims it was entitled to set off said deposit against the indebtedness of Imbrie & Company.

4. The Master has found in his ninth conclusion of law, and has so reported, stated and certified that the intervener is entitled to recover of the Bank Two Thousand Six Hundred and Fifty-six & 13/100 ($2,656.13) Dollars the amount of said judgment; whereas under the findings of fact, the Master should have reported and found that the intervener was not entitled to recover this sum or any sum against the Bank.

Wherefore the Fulton National Bank of Atlanta prays that these its exceptions be sustained by the Court and

that the findings of the Master as herein excepted to be overruled and that a decree be entered acordingly.

LITTLE POWELL SMITH & GOLDSTEIN,
Solicitors for The Fulton National Bank of Atlanta.
MARION SMITH,
Of Counsel.

---

77 OPINION.

In the District Court of the United States for the Northern District of Georgia.

Beaver Boards Companies,
vs. No. 158, Ancillary Bill.
Imbrie and Company.

J. H. Hillsman & Company, et al,
vs.
Imbrie and Company.

Removed from the Superior Court of Fulton County and Consolidated.

Intervention of I. S. Hosier.

On March 3rd, 1921, in the District Court of the United States for the Southern District of New York, was filed a creditors bill against Imbrie & Company, stock and bond dealers and brokers, citizens of New York, New Jersey and Massachusetts, whose principal place of business was New York. Receivers were appointed. On the same day, in the Superior Court of

Fulton County, Georgia, other creditors, citizens of Georgia, sought and obtained a receiver for assets of Imbrie & Company in Georgia connected with a branch office operated in Atlanta. On March 7th, 1921, the New York receivers, by direction of the New York court, applied for ancillary receivership in this court and were, with the State Court receiver, made such ancillary receivers. On March 8th, Imbrie & Company removed to this Court the case in the Fulton Superior Court. The two proceedings were then consolidated by consent, and numerous interventions have been allowed in this Court, among them that of I. S. Hosier. His claim, in brief, is that he gave Imbrie & Company in Atlanta, on February 21st, 1921, a check for $2656.13, to be used as his brokers in buying certain stocks; that Imbrie & Company deposited it to their credit in Fulton National Bank on February 23rd; that the proceeds of its collection were still to the credit of Imbrie & Company at said bank, though in equity belonging to Hosier, when the
78 firm failed without having bought the stock, whereupon Fulton National Bank on March 3rd, offset certain notes it held against Imbrie & Company against the deposit, absorbing it. Hosier prays that the Bank be made a party and be required to pay the $2656.13 to the receivers or to him. By an amendment he asks also a judgment against the estate in the receivers' hands, with a first lien or otherwise, if the bank could not be required to repay the money to them for him. This intervention was allowed, the bank was made a party and the issues made by answers to the intervention referred to a Master. Exceptions to his report raise three principal questions: First, has this Court, as a Federal Court, jurisdiction of this controversy; second, should it pass upon it or remand the parties to the primary juris-

diction in New York; third, on the merits has the bank the right to make the setoff as against Hosier.

1. Such discretion as the Court has in allowing interventions has been exercised in the allowance of this one, In testing the Federal jurisdiction to entertain it the case may be considered as a primary creditor's bill. Such the proceeding removed from the State Court is. As to ancillary proceedings, the Federal jurisdiction as distinguished from territorial jurisdiction would be the same as in the primary Court. The purpose of the ancillary receivership is to extend the power of the primary Court over a territory which it itself could not otherwise reach. The basis of Federal jurisdiction in all the suits is diversity of citizenship. Creditors of Imbrie & Company having the requisite diversity of citizenship have invoked Federal authority and in the exercise of it the Federal Court must exercise an equitable jurisdiction in the collection and administration of assets, which may result in following complicated threads of right through all their ramifications in the affairs of Imbrie & Company.

Dependent controversies thus arising are entertained in the Federal Court, although standing alone jurisdiction would not have been exercised over them, only from the necessity for entertaining them in order to execute fully and correctly the original jurisdiction. Let us follow this idea through familiar instances. Re-
79 ceivers having been appointed to collect all assets within the territorial jurisdiction of the Court for the purpose of applying them to the claims of the creditors who filed the proceeding, in order to avoid depriving other creditors having equal rights of their share in the assets so collected, the Federal Court must permit them to intervene and assert their rights regardless of

their citizenship, or amount involved. So again, the Court having seized control of the assets must be open to entertain complaints of others seeking to assert title to, a lien upon or an equity in any of the property so taken by the Court to avoid doing wrong to them by the taking. These may intervene or proceed by dependent bill regardless of citizenship, as was allowed in a branch of this same litigation in Equitable Trust Co. vs. Port Wentworth Terminal Corp. et al., 281 Fed. 883. So the Federal Court's receiver may be authorized, if assets are withheld, to proceed against persons having them without regard to the citizenship of the parties to that particular controversy or the amount involved. The right thus to control assets is not confined to such as are physical and of which physical possession may be taken. It applies to collecting choses in action, the control over while may be asserted by actual collection or by the institution of a suit therefor or having an accounting in cases of complication; White vs. Ewing, 159 U. S. 36. Upon the filing of an application for receivership the power of the Court to control all the assets attaches, though actual possession has not been taken, and it will not be interfered with by any other Court under proceedings subsequently filed; Palmer vs. Texas, 212 U. S. 118, 129. This potential control continues until the asset is brought within the receivership or until the Court definitely abandons it; Porter vs. Sabin 149 U. S. 473. The deposit account of Imbrie & Company with Fulton National Bank was an asset within the territorial jurisdiction of the Court when on March 3rd application was made for receiver and a receiver appointed in Georgia. The right of this Court to direct its receiver to collect it must be considered undoubted. The fact that Fulton National Bank, since the failure and on the same day that the receiver was ap-

pointed, undertook to destroy the asset by off-
80 setting it against its debt would not hinder this Court from investigating such disposition and bringing to an accounting the Fulton National Bank. In such accounting Hosier might well have been made a party for the purpose of asserting his right to the asset in question. The disposition sought to be made by Fulton National Bank could not be treated as final or cutting off this right of enquiry and administration by the Court through the receivership. The question of an independent remedy elsewhere being afforded to Hosier is beside the mark. It may be true that he would have the right to sue Fulton National Bank in equity in a State Court under the decision of Union Stock Yards Bank vs. Gillespie, 137 U. S. 411, but in such a suit claiming the deposit in equity to be his, he could not ask a judgment to that effect against Fulton National Bank without joining, necessarily, as parties in this suit, Imbrie & Company and the receivers now in charge of their assets, because otherwise the judgment of the Court would not do complete justice but would leave Fulton National Bank exposed to a suit by Imbrie & Company or the receivers upon the legal liability to them; Shields vs. Barrow, 17 How. 130; Porter vs. Sabin, 149 U. S. 473. Had Hosier attempted such a remedy the consent of this Court to join its receivers would have been necessary, Judicial Code 66 not applying. It could have accorded such consent, thereby relinquishing control of this asset to the State Court, or it could have declined it, in which event it would be in duty bound to administer the asset and try the controversy itself. Instead of so doing, Hosier has applied directly to this Court in substance for the same action by it. It does not seem that the authority of the Court to deal with the controversy is any less because Hosier asks it to do so, than it would be if

it had of its own motion directed the receivers to proceed. Indeed this Court could not rightly allow matters to remain as they are. It appears that Fulton National Bank, after crediting the deposit account in controversy and realizing on other collateral, has due it a balance of about seven hundred dollars and still holds as collateral security twenty thousand dollars of Port Wentworth Terminal bonds and two hundred shares of
81 sugar stock described as of doubtful value. By nonaction the receivers of this Court would thus permit the use of Hosier's money wrongfully as between Hosier and Imbrie & Company, to relieve collateral which seems likely to come finally into the estate handled by the receivers, and certainly to diminish the general claim of the bank against the general assets of Imbrie & Company. To permit this consequence to ensue would be for this court and its receivers to take a wrongful advantage of Hosier's money. There would appear to be not only a convenience but a necessity for it to entertain an accounting between the bank, Hosier and the receivers for the purpose of adjudging and settling their respective rights. Any other rule would have required in this litigation numerous trials in State Courts, about nearly every asset in the hands of the receivers, with an embarrassment and a delay to the Federal Court in the execution of its functions that would have been intolerable. The intervention of Hosier is, in substance, but a seizure on the part of this Court of the asset of Imbrie & Company represented by this deposit account with Fulton National Bank, by requiring an accounting with said bank of the deposit for the benefit of all who may be concerned, giving effect, of course to all the just rights at law or in equity of the bank in making the accounting. The right and duty of examining into the disposition alleged to have been made of this asset since the failure of

Imbrie & Company seems undoubtedly to vest in the Court of the receivership.

2. It is doubtful whether this consolidated case be really an ancillary one. A receiver in Georgia was appointed in the State Court before the ancillary receivers were appointed in the Federal Court and the two proceedings have since been consolidated. The Atlanta office, however, was only a branch office and the assets here are relatively small and the major administration must necessarily, in fact, be in the New York Court. The case here has heretofore been treated as ancillary to that there. So viewing it, this Court has announced that it would collect the assets here, entertain such litigation as was involved in such collection, would adjudicate all claims of title to, special liens on or equities in
82 the assets here and would then remit any funds to the main jurisdiction and require all claims against the general assets to be asserted there. But the right sought to be asserted here is a special equity attaching not to the general estate but to a particular asset, to-wit: the deposit account with Fulton National Bank. It is no violation of comity between courts of primary and ancillary jurisdiction to examine and adjudicate this equity here. This Court will not undertake to decree a general lien on the estate of Imbrie & Company or to fix any priority therein.

3. The exceptions made to the Master's findings of fact do not appear to be well taken and are each overruled. Under the facts found by him the check of $2656.13 was not delivered as an advance payment for stock purchased of Imbrie & Company, but to be used by them as Hosier's agent in paying for stock to be purchased for him from others. Imbrie & Company had no

right to use it for their own purposes. When they deposited it in their own name in the bank, since it was a negotiable paper,a good title to the check passed to the bank, it having no notice of the facts. Knowledge that Imbrie & Company sometimes acted as brokers was not notice that a particular check apparently belonging to them really belonged to the drawer, nor did it require enquiry as to the real ownership of each check deposited. But the case here does not concern title to the check but title to what the bank gave in exhange for the check. Had it given money, that money, as between Hosier and Imbrie & Company, would have still been Hosier's, to be used to buy the stock. The deposit, though a chose in action, stood exactly the same; while the legal title to it was in Imbrie & Company, the beneficial ownership was in Hosier, and Imbrie & Company could rightfully use it only to pay for the stock which they were to buy was in Hosier. That such equitable rights as between the parties attach to bank deposits is settled by Union Stock Yards Bank vs. Gillespie, 137 U. S. 411; Central National Bank vs. Conn. Mutual Insurance Co., 104 U.. S. 54. Nothing happened to the deposit account between the date of this deposit and the failure by which it
83 could be said to have been withdrawn or dissipated. The Master in his 7th finding of fact establishes this. Any withdrawals that may have occurred not reducing the balance below the deposit in controversy would be presumed to have been of money belonging to Imbrie & Company; Lowell vs. Brown, 284 Fed. 936; cases cited in Central National Bank vs. Conn. Mut. Insurance Co., supra. Had the matter not been complicated by the bank's effort to set-off, it is clear that the receivers would have come into possession of this deposit, and would have been bound to surrender it to Hosier. What then were the bank's rights? Their con-

tract rights are not important. The agreement of Imbrie & Company to maintain a balance liable to set-off equal to one-fifth of their indebtedness to the bank was kept, such balance being always maintained over and beyond the fund here in dispute. The agreement contained in one of the notes that the bank might set off the deposit balance adds nothing to the legal right so to do. This particular deposit did not exist when the agreement was made and nothing was done or refrained from on the strength of it. The right to make the set-off is, however, a legal right. It exists in others than bankers and is confirmed by statute in Georgia, Code 4340, 4341, 4349. Perhaps custom plays a part in its application to bankers. It is not in strictness a lien, as is the bankers right to realize on physical property and papers of his debtor in his possession, though it is sometimes called such. The Banker may set off what he owes to his debtor, but not what he owes to some other. The first test of whom it is that he owes is the legal liability. But this may be affected by the equities of others in the debt. If he knows of these equities, his legal right to set-off like other legal rights, becomes subject to known equities; Union Stock Yards Bank vs. Gillespie, 137 U. S. 411; American Trust & Banking Co., vs. Boone, 102 Ga. 202. If the equity is unknown it may still prevail if asserted before the banker has acted or refrained from acting on the faith of the appearances of the matter. If he has given credit to the deposit he is protected as a sort of bona fide purchaser, or perhaps more correctly it becomes a case in which one of two innocent
84 parties must suffer from the wrongful act of a third, in which case the loss is visited upon him who put it in the power of the wrongdoer to inflict the loss. If he has given no credit to the deposit he is then in the situation of a mere volunteer against whom

equities may be freely asserted. Such is the reasonable law laid down as to brokers in Bank of Metropolis vs. New England Bank, 1 How. 234; 6 How. 212, and as to others in Wilson & Co. vs Smith, 3 How. 762. The cases of American Trust & Banking Co. vs. Boone; Central National Bank vs. Conn. Mut. Insurance Co., and Union Stock Yards Bank vs. Gillespie, cited above, are not in conflict with this doctrine. In the latter cases notice to the banker in fact existed and his right of set-off was defeated for that reason. No question arose as to what the applicable law would have been in the absence of notice. In the present case the bank, by contract, stipulated for the maintenance, subject to set-off, of a deposit balance of a certain amount. This balance was maintained outside of the fund in controversy, and it alone seems reasonably to have been credited by the bank. No new loan, nor any renewal of an old one, occurred between the deposit of the sum in controversy and the failure; no checks were honored which would not have been honored had this deposit not been made. The bank shows nothing to rebut or hinder the equity of Hosier, notwithstanding it had no notice of his equity. The bank should therefore be decreed to surrender to the receivers the sum in controversy, and they in turn should surrender it to Hosier. A decree may be presented accordingly. This 13th day of March, 1923.

SAM'L. H. SIBLEY,
U. S. Judge.

85 Intervention of I. S. Hozier.

This cause coming on to be heard, and having been argued by counsel, it is, upon consideration thereof, ordered, adjudged and decreed as follows:

That all exceptions of law and of fact to the findings of the Master on said intervention, be and the same are hereby overruled.

That the Receivers in the above stated consolidated cause recover from the Fulton National Bank of Atlanta the principal sum of Twenty-six Hundred Fifty-six and 13/100 ($2656.13) Dollars, together with interest at the rate of seven (7%) per cent. per annum from the date of this judgment, and upon the recovery of same, that said Receivers pay said amount to I. S. Hozier, intervener, or his counsel of record.

It is further ordered, adjudged and decreed that the costs in said intervention be taxed as follows: costs heretofore paid are taxed against the parties who paid them—all other costs are taxed against Fulton Nationl Bank.

This April 14th, 1923.

SAM'L. H. SIBLEY,
United States Judge.

Filed in Clerk's Office Apr. 14, 1923.

86 INTERVENTION OF I. S. HOSIER.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies,

vs. No. 158 In Equity.

Imbrie & Company.

J. H. Hilsman & Company, et al,

vs.

Imbrie & Company.

Removed from the Superior Court of Fulton County and Consolidated.

The Fulton National Bank of Atlanta feeling itself aggrieved by the order and decree entered on the 14 day of April, 1923, against it for the recovery by the Receivers for the use of the intervener, I. S. Hozier, of the sum of $2656.13, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignments of errors, which are filed herewith, and tenders herewith bond in such sum as the Court may direct to cover the costs and the eventual condemnation money in said cause.

Wherefore, the said Fulton National Bank of Atlanta respectfully prays that the Court will allow this appeal and that the said appeal be made returnable to the United States Court of Appeals for the Fifth Circuit, according to law, and that a transcript of the record,

proceedings, and papers upon which said decree is rendered, duly authenticated, be sent to the said United States Circuit Court of Appeals, and that upon the allowance of appeal the Court will order that all
87 further proceedings, including the execution of the said order and decree, be superseded and stayed until the determination of the said appeal by the said United States Circuit Court of Appeals for the Fifth Circuit.

This the 1st day of May, 1923.

LITTLE POWELL, SMITH & GOLDSTEIN,
Solicitors for the Fulton National Bank of Atlanta.
MARION SMITH,
Of Counsel.

---

88 The foregoing petition for an appeal being this day presented to the Court; it is ordered that said appeal be allowed and that said appeal be returnable to the United States Circuit Court of Appeals for the Fifth Circuit, and that the plaintiff shall give bond, payable to the receivers herein, for the use of I. S. Hosier, in the sum of $3,500.00, with surety to be approved by the Judge of this Court, to answer all damages and costs, and the eventual condemnation money in said case, if it shall fail to make its plea good; and that upon the filing and approval of said bond all further proceedings herein, including the execution of the said decree, are hereby stayed and superseded until the final determination of said appeal.

This the 2 day of May, 1923.

SAM'L. H. SIBLEY,
United States Judge.

U. S. District Court. Filed in Clerk's Office May 2, 1923.

---

89 ASSIGNMENTS OF ERROR.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies,
vs. No. 158 In Equity.
Imbrie & Company.

J. H. Hilsman & Company, et al,
vs.
Imbrie & Company.

Removed from the Superior Court of Fulton County and Consolidated.

Intervention of I. S. Hosier.

The Fulton National Bank of Atlanta, appellant in the above stated case, having prayed for an appeal from the decree against it to the United States Circuit Court of Appeals for the Fifth Circuit, does hereby assign errors as follows in the record and proceedings herein:

1. That the Court erred in overruling the objections of the Fulton National Bank of Atlanta to being made a party hereto and in making the said Fulton National

Bank a party hereto, the said error being, as appellant respectfully contends, that the Federal Court had no jurisdiction of the intervention against the said Fulton National Bank of Atlanta, and that it, therefore, should not have been made a party to said case, it appearing that the sole purpose of the said intervention was to assert a claim for the intervener, I. S. Hosier, against the Fulton National Bank for $2656.13, and that the controversy presented by the said intervention
90 was not connected with the liquidation of the affairs of Imbrie & Company but was a controversy between citizens of the same State, separate and independent from the main case, and involving less than the jurisdictional amount.

2. The Court erred in overruling the first exception filed by the appellant to the report of the Standing Master wherein the appellant excepted to the first conclusion of law of the Standing Master in which the Standing Master found, over the objection of the appellant, that the Court had jurisdiction of the intervention against the appellant. In connection with this assignment of error the appellant points out that the intervention presented a controversy between I. S. Hosier and the appellant which was entirely disconnected with the administration of and liquidation of the estate of Imbrie & Company and, therefore, not dependant upon or connected with the main bill in this cause, but was, as appellant contends, a separate and distinct controversy between citizens of the same State involving less than the jurisdictional amount, and, therefore, not within the jurisdiction of the Federal Court. Appellant also contends in this connection that the subject matter of the controversy was not drawn into the custody or jurisdiction of the Court by the main bill.

3. The Court erred in overruling the second exception of the appellant to the report of the Standing Master, wherein the appellant excepted to the fifth conclusion of law of the Standing Master in which the Standing Master found that the intervener was the equitable owner of the chose in action represented by $2656.13 of the indebtedness of the Bank to Imbrie & Company shown by its deposit. Said finding of the
91 Standing Master was error, because under the proof in the case the bank was entitled to set off the entire balance in the account of Imbrie & Company against the debt of Imbrie & Company to the bank, and this right of the bank was superior in equity to whatever rights the intervener might have or claim against the said deposit, since the bank was, under the evidence, and under the findings of the Master, not chargeable with notice of any rights of the said intervener.

4. The District Court erred in overruling the third exception of the appellant, wherein the appellant excepted to the fifth conclusion of law of the Standing Master, in which the Standing Master found that the appellant was not entitled, as against the intervener, to charge off the said deposit against the indebtedness of Imbrie & Company. Said finding was error, because under the proof and the findings of the Master Imbrie & Company was indebted to the bank in a larger amount than the said balance and the bank was charged with no notice of any secret equities in the interevener.

5. The Court erred in overruling the fourth exception of the appellant to the report of the Standing Master, wherein the appellant excepted to the ninth conclusion of law, in which the Standing Master found that the interven-

er was entitled to recover a judgment against the appellant. Said finding is error, because under the proof and the findings of the Master the appellant was charged with no notice of the secret qualities now asserted by the intervener, and was, therefore, entitled to charge off Imbrie & Company's balance against Imbrie & Company's indebtedness, and this right of set off was superior to the secret and unknown equities of the intervener.

92 6. The Court erred in holding that the receivers were entitled to recover against the appellant the amount of $2656.13 which was to be delivered by the receivers to the intervener, and in rendering a decree against the appellant in favor of the receivers for said sum. The error in said holding and decree consists in the fact that the receivers could assert no right or title except the right or title of Imbrie & Company, and Imbrie & Company, under the proof and the findings of the Master, were indebted to the bank in a greater sum than the alleged bank deposit, and the right of the bank to set the same off against the said indebtedness was superior to any claim of the receivers therefor, either generally or for the use of any person, and especially superior to any claim of the receivers for the use of the intervener whose equities, if any, were, under the proof and the findings of the Standing Master, unknown to the bank and as to which the bank was not chargeable with notice.

7. The Court erred in rendering a judgment and decree against appellant in favor of the receivers to be delivered by the receivers to the interveners in the sum of $2656.13 for the reason that neither the evidence nor the facts found by the Master are sufficient to justify or authorize such a decree.

Wherefore, for these and other errors patent upon the face of the record the Fulton National Bank of Atlanta, appellant herein, prays that the decree of the District Court be reviewed and reversed, and that a decree be rendered or directed in favor of the appellant herein on the assignments of error herein made.

LITTLE, POWELL, SMITH & GOLDSTEIN,
Solicitors for the Fulton National Bank of Atlanta.
MARION SMITH,
Of Counsel.

U. S. District Court. Filed in Clerk's Office May 2, 1923.

---

93 INTERVENTION OF I. S. HOSIER.

In the District Court of the United States for the Northern District of Georgia.

Beavor Board Companies,
vs. No. 158 In Equity.
Imbrie & Company.

J. H. Hilsman & Company, et al,
vs.
Imbrie & Company.

Removed from the Superior Court of Fulton County and Consolidated.

Know all men by these presents: That the undersigned, The Fulton National Bank of Atlanta, as principal, and

W. J. Blalock, as surety, acknowledge ourselves jointly and severally bound unto Theodore G. Smith, John B. Johnston, and Edward L. Gilmore, as Receivers of Imbrie & Company, for the use of I. S. Hosier and unto I. S. Hosier, in the sum of $3500.00 conditioned as follows:

Whereas, on the 14 day of April, 1923, in the District Court of the United States for the Northern District of Georgia, in the above stated suit, a decree was rendered against the said Fulton National Bank of Atlanta in favor of the said Receivers for the use of the said I. S. Hosier, and the said Fulton National Bank of Atlanta having obtained an appeal to the Circuit, Court of Appeals of the United States for the Fifth Circuit, and having filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation having issued directed to the said Receivers, and to the said I. S. Hosier, citing and admonishing them to be and appear at the session of the United States Circuit
94 Court of Appeals for the Fifth Circuit to be holden in the City of New Orleans, within thirty days next thereafter.

Now, if the said Fulton National Bank of Atlanta shall prosecute its appeal to effect and answer all damages and costs, including the eventual condemnation money in said decree, if it shall fail to make its decree good, then the above obligation to be void, else to remain in full force and virtue.

THE FULTON NATIONAL BANK
OF ATLANTA, (L. S.),
By R. G. CLAY, Principal,
Vice-President, Cashier.
W. J. BLALOCK, (L. S.), Surety.

Approved: 2nd May, 1923.
SAM'L. H. SIBLEY,
United States Judge.

U. S. District Court. Filed in Clerk's Office, May 2, 1923.

---

95 CONDENSED STATEMENT OF THE EVIDENCE.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies,
vs. No. 158 In Equity.
Imbrie & Company.

J. H. Hilsman & Company, et al,
vs.
Imbrie & Company.

Removed from the Superior Court of Fulton County and consolidated.

Intervention of I. S. Hosier.

It was stipulated between the counsel of all parties that the following facts might be taken to be true and admitted by all parties:

On the 21st day of February, 1921, and for about eighteen months prior thereto, Imbrie & Company were engaged in business, with their main office in New York and a branch office in Atlanta, the business being that

of brokers and dealers in stock and bonds and other forms of securities. Imbrie & Company acted as brokers in those transactions, and also, in addition thereto and as a regular part of their business, they bought and sold securities for their own account and as direct dealers therein.

During this time Imbrie & Company had a general bank account with the Fulton National Bank of Atlanta.

On March 3, 1921, receivers were appointed in the City of New York for Imbrie & Company, and thereafter ancillary proceedings were instituted in this jurisdiction. On that date Imbrie & Company were insolvent. On or about March 4th J. H. Hilsman, et al, brought a suit for receivers in Fulton Superior Court, which was removed to the United States District Court, and the two cases were consolidated.

96 On the date of the said receivership Imbrie & Company had to their credit in the Fulton National Bank, on said open deposit, a balance of $27,950.65, and were indebted to the Fulton National Bank, upon a note dated February 1, 1921, in the sum of $7,800.00, and upon a note dated October 1, 1920, in the sum of $25,000.00, making a total indebtedness on the said two notes of $32,800.00. Upon the appointment of the receivers the Fulton National Bank charged off the balance of Imbrie's bank account against the notes due by Imbrie & Company to the Bank and credited the amount of the said bank account on the said notes. Copies of the two notes are as follows:

"$7800.00 Atlanta, Ga. Feb. 1, 1921.

April 1, 1921 after date, for value received I promise to pay to the order of The Fulton National Bank of Atlanta at the office of The Fulton National Bank, in the City of

Atlanta, Ga., the sum of Seventy eight hundred and 00/100 Dollars, with interest from maturity until paid at the rate of eight per cent per annum, together with all costs of collection, including ten per cent. of the principal and interest hereof as attorneys fees; having deposited herewith as general collateral security for the payment of this note and any and all other liability direct or indirect, joint or several, of the undersigned to the payee or holder hereof, already existing or which may hereafter arise, and whether due or not due the following property, viz:

250 shares Class A Chatt. Coke & Gas Co.

and do hereby give the holder hereof a lien for this note and all said demands upon all property left with said holder and upon any balance of deposit account of the undersigned with said holder with authority to at any time charge any or all of said demands against the deposit account on the books of the holder hereof, if there be such an account, but failure to apply any balance of said deposit account on this note or a surrender or release of any of said property on which a lien is created hereby except that specifically described above, shall not affect the liability of any indorser, guarantor, surety or other party to this note of release or relieve them or any of them from liability to pay the full amount of this note; and do hereby authorize and empower the holder hereof, or any officer, agent or attorney of the holder on the non-payment of this note or any other such liability, to sell and transfer said property and collaterals, or any property added to or substituted for the same, or any part thereof at any broker's board, or at
97 public or private sale, and without notice of intention to sell, or of the time or place of sale,

and without demand of payment of this note or of any such other liabilities. Should the market value of the collateral hereby or hereafter pledged depreciate in the judgment of the holder of this note, the undersigned hereby agree to deposit on demand a further amount of collateral security satisfactory to the holder hereof, so that the market value shall always be at least .... per cent, more than the amount of this note, and upon failure to comply with any such demand, this note shall at the option of the holder, become due and payable forthwith, without notice, and the whole or any part or parts of said collateral securities or substitutes therefor and additions thereto may be sold as herein provided, at the option of the holder hereof. After deducting the costs and expenses of collection and sale, including attorney's fees, the residue of the proceeds of any sale, collection or other disposition of any of the securities or property aforesaid may be applied to the payment in whole or in part of any then existing liability of the undersigned to the holder hereof, due or not due, including this note, deducting unearned interest upon demands not due; and in case of deficiency the undersigned agree to pay the holder hereof the amount thereof forthwith, after such sale or other disposition, with legal interest.

It is also agreed and understood that upon any sale of said collaterals the holder hereof, or anyone in its or his behalf, may become the purchaser thereof, and hold the same, thereafter in his or its own right absolutely free from any claim of the undersigned, and no other purchaser shall be answerable to the application of the proceeds of any sale.

Upon the transfer of this note the payee may deliver the collaterals or any part thereof to the transferee, who shall become vested with all powers and rights of the payee in respect thereto and the payee shall thereafter

be forever relieved and fully discharged from any liability or responsibility in the matter.

The undersigned, as well as all sureties, endorsers, guarantors, or other parties to this note, severally waive, each for himself and family, any and all homestead and exemption rights which any of them, or the family of any of them, may have under or by virtue of the Constitution or laws of the United States, or of any State, as against this debt or any of said liabilities or any renewal thereof; and each further waives demand, protest and notice of demand, protest and non-payment.

Given under the hand and seal of each party.

IMBRIE & COMPANY, (Seal).
DAVENPORT POGUE, (Seal).

98 Stock Note—278. New York. October 1st, 1920.

$25,000.00.

On demand after date, for value received, we promise to pay to the order of the Fulton National Bank Twenty Five Thousand & 00/100 Dollars with interest at .. per cent per annum payable at The Fulton National Bank, Atlanta, Georgia, having deposited with them as collateral security for payment of this or any other liability or liabilities of ours to said Bank due or to become due, or that may be hereafter contracted, the following property, viz:

6M Savannah & Atlanta 6s.
8M State of Santa Catharina 6s.
222 Arcadia Sugar pr.

The market value of which is now $..... with the right on the part of the said ..... from time to

time to demand such additional collateral security as... may deem sufficient should the market value thereof decline, and upon ..... failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to ..... or ..... assigns in case of such default or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign, and deliver the whole, or any part of such securities or any substitutes therefor or additions thereto at any broker's board or at public or private sale, at their option, at any time or times thereafter without advertisement or notice to ..... and with the right on ..... part to become purchasers thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said ..... shall deem proper, returning the overplus to the undersigned; and ..... will still remain liable for any amount so unpaid.

(Signed) IMBRIE & COMPANY."

On February 21, 1921, the intervener placed an order with Imbrie & Company for the purchase of certain stock and gave to Imbrie & Company his check for $2656.13, to be used by Imbrie & Company in purchasing the said stock for him. This check was indorsed by Imbrie & Company, and on February 23, 1921, deposited by Imbrie & Company to their credit in their bank account in the Fulton National Bank of Atlanta, being the bank account heretofore referred to. The check was collected
99 by the Fulton National Bank. The check was not marked or indorsed with any statement of the purposes for which it was given but was merely an or-

dinary bank check in the ordinary form, payable to the account of Imbrie & Company, without any explanation of its purpose. No statement was made to the bank with regard to said check when it was deposited. Imbrie & Company made a large number of deposits and withdrawals each day.

There was a verbal agreement between the bank and Imbrie & Company that it would not allow its deposit with the bank to fall below 20% of the total indebtedness of Imbrie & Company to the bank. This agreement, however, was not kept, and on several occasions the balance did fall below this 20%. However, after the date of the deposit of the Hosier check it did at no time fall below the 20%, and would not have been below the 20% had Hosier's check been eliminated from the account, and it was agreed that the bank did not claim any defense against Hosier, based on this agreement to maintain the Imbrie balance.

No new loan, nor any renewal of any old loan, occurred between the date of the deposit of the sum in controversy and the failure of Imbrie & Company, and no checks were honored which would not have been honored had this deposit not been made.

After the deposit of the Hosier check, and until the date of the failure, the lowest amount credited on the books of the Fulton National Bank to the Imbrie Deposit at any time was the sum of $15,754.70.

Imbrie & Company failed to purchase the stock ordered by the intervener, and have never purchased or delivered this stock.

100 The balance of Imbrie & Company in the Fulton National Bank of Atlanta at no time after February 23, 1921, fell below the sum of $15,754.70, and up to the time the entire balance was charged off by the Fulton National Bank against the notes as aforesaid.

In addition to the foregoing stipulation, RYBURN G. CLAY testified for the Fulton National Bank, in substance, as follows:

"I am Cashier of the Fulton National Bank of Atlanta, and was during 1921, and was the officer of the bank giving special supervision to the account of Imbrie & Company. Neither I nor any other person connected with the bank, at any time prior to the failure of Imbrie & Company, had any notice or information that any person other than Imbrie & Company owned the bank balance standing in the name of Imbrie & Company or any part thereof. Upon the failure of Imbrie & Company there was practically no market for the securities the bank held as collateral, they being securities in which Imbrie & Company were chiefly interested and for which Imbrie & Company had furnished whatever market existed, and upon the failure of Imbrie & Company the market for the securities ended. Information was given me by the managers of Imbrie & Company as to the kind of business they conducted at the time the bank account was opened. This information was that they were both dealers and brokers. A dealer is a person who buys for his own account, or finances for his own account, securities of one kind or another. A broker is one who handles
101 such securities on commission. Our information was that Imbrie & Company did both. When a check of one of Imbrie's customers was brought to the bank and deposited to Imbrie's account, there was not any way the bank could know whether that check had been given Imbrie as a broker, or given in purchase of securities from Imbrie as a dealer. There was nothing that brought that information home to us—as to what sort of relation that customer was standing in to Imbrie.

"With regard to Hosier's check; We had no knowledge

whatever as to whether that check had been given Imbrie to be used by them as brokers, or whether given them on a contract of purchase for securities handled by Imbrie & Company as dealers. With regard to any check handled by Imbrie & Company the situation was the same. When Imbrie failed we charged off their balance of $27,950.65 against the notes of Imbrie & Company held by us which aggregated $32,800.00. We have since liquidated some collateral, and the balance now due us by Imbrie & Company, after this charge off, and after liquidating some collateral, is about $700.00. We still hold as collateral twenty thousand Port Wentworth Terminal bonds, and two hundred shares of Arcadia Sugar. It is very doubtful whether these securities are worth anything."

In the cross-examination of Mr. Clay the following occurred:

"Q. You know as a matter of course, that some of the deposits that were being made by Imbrie &
102 Company were desposits by customers for the purchase of stocks or bonds on brokerage?

A. I did not know what they were for. They were both dealers and brokers.

"Q. You did not know whether the checks being deposited were for purchases by customers on a brokerage basis, or whether purchases being made in connection with sales of Imbrie's own stock?

A. I had no direct knowledge about the checks.

"Q. You made no inquiries with reference to any individual checks?

A. None.

"Q. And, so far as you know, no officer of the bank made any inquiries of that character?

A. So far as I know."

We agree that the foregoing constitutes a true and correct summary of the evidence in this case.

DORSEY, BREWSTER, HOWELL & HEYMAN,
Attorneys for Intervener.

The foregoing summary of the evidence is approved as a correct abstract of the evidence in this case.

This the 2nd day of May, 1923.

SAM'L. H. SIBLEY,
United States Judge.

Filed in Clerk's Office May 2, 1923.

---

103 INTERVENTION OF I. S. HOSIER.

In the District Court of the United States for the Northern District of Georgia.

Beaver Board Companies,
vs. No. 158 In Equity.
Imbrie & Company.

J. H. Hilsman & Company, et al,
vs.
Imbrie & Company.

Removed from the Superior Court of Fulton County and Consolidated.

To the Honorable O. C. Fuller, Clerk of the United States District Court, Atlanta, Georgia:

The Fulton National Bank of Atlanta, appellant herein, specifies the following portions of the record as material to a clear understanding errors complained of:

1. The original petition filed by Theodore G. Smith and John B. Johnston, Receivers, (together with a certified copy of the New York proceedings) praying for the appointment of ancillary receivers in this district.

2. The certified copy of the record from Fulton Superior Court on removal of the suit of J. H. Hilsman & Company, et al, vs. Imbrie & Company, including the petition and bond for removal omitting the interventions in the State Court.

3. The order consolidating the two cases just named.

4. The order appointing ancillary receivers in this jurisdiction.

5. The order appointing Edward L. Gilmore, one of the receivers, in place of Remsen P. King,
104 deceased.

6. The intervention of I. S. Hosier and the rule issued thereon.

7. The amendment to the intervention of I. S. Hosier.

8. The objections filed by the Fulton National Bank of Atlanta to being made a party to said cause, filed on April 30, 1921.

9. The order and decree of the Court dated June 2, 1921, overruling said objections and making the Fulton National Bank a party hereto.

10. The answer of the Fulton National Bank to the National Bank a party hereto.

11. The amendment to the answer of the Fulton National Bank to the intervention of I. S. Hosier.

12. The order of reference of the intervention of I. S. Hosier to Cam D. Dorsey, Esq., Standing Master in Chancery.

13. The report of the Standing Master on the intervention of I. S. Hosier.

14. The exceptions of the Fulton National Bank of Atlanta to the report of the Standing Master.

15. The opinion of the Court sustaining the report of the Standing Master and authorizing a decree to be taken in favor of the receivers for the amount in controversy, to be delivered by them to Hosier, which opinion is dated March 13, 1923.

16. The decree of the Court, dated the 14 day of April, 1923, following the opinion of the Court.

17. The petition for appeal, and the order allowing the same.

105 18. The assignments of error.

19. The appeal bond.

20. The condensed statement of the evidence and order approving same.

21. The Citation on appeal, together with the acknowledgment of service thereon.

22. This praecipe.

LITTLE, POWELL, SMITH, & GOLDSTEIN,
Solicitors for Appellant.

MARION SMITH,
Of Counsel.

Service of the foregoing praecipe is hereby acknowledged, this the 2nd day of May, 1923.

DORSEY, BREWSTER, HOWELL & HEYMAN,
Attorneys for I. S. Hosier.

EDWARD L. GILMORE,
Receiver, Acknowledging for Receivers.

U. S. District Court. Filed in Clerk's Office, May 2, 1923.

---

106 Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. District Court of Appeals.

* * * * * * *

107 CLERK'S CERTIFICATE.

United States of America, ss.
Northern District of Georgia.

I, OLIN C. FULLER, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing attached 106 pages of printing and writing contains a true copy of the record, assignments of error and all proceedings in the case of The Beaver Board Companies vs. Imbrie & Company, et al and J. H. Hilsman & Company, et al., vs. Imbrie & Company, Intervention of I. S. Hozier, wherein the Fulton National Bank of Atlanta, is Appellant versus I. S. Hosier, and Theodore G. Smith, John B. Johnston and Edward S. Gilmore, as Receivers of Imbrie & Company, are Appellees, being No. 158 in Equity and No. 120 Appeals, as specified in the Praecipe of Counsel therein as fully as the same remains of record and on file in the office of the Clerk at Atlanta, Georgia, except that the Original Citation with acknowledgment of service therein is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this the 22nd day of May A. D. 1923.

OLIN C. FULLER,
(Seal) Clerk, U. S. District Court, Northern District of Georgia.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION

On this day this cause was called, and, after argument by Marion Smith, Esq., for appellant, and Arthur Heyman, for appellees, was submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4100

FULTON NATIONAL BANK OF ATLANTA, Appellant,

versus

I. S. HOSIER and THEODORE G. SMITH et als., as Receivers of Imbrie & Company, Appellees

Appeal from the District Court of the United States for the Northern District of Georgia

OPINION—Filed Dec. 13, 1923

Marion Smith (Little, Powell, Smith & Goldstein, and Marion Smith, on the brief), for Appellant.

Arthur Heyman (Dorsey, Brewster, Howell & Heyman on the brief), for Appellees.

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

GRUBB, District Judge:

This is an appeal from a decree of the District Court for the Northern District of Georgia upon an intervention of the Appellee, Hosier, filed and allowed in a consolidated cause pending in that court in the nature of a creditors' bill for the liquidation of the affairs of the Appellees, Imbrie & Company, and the distribution of their assets among their creditors, in which the appellees, Theodore G. Smith and John B. Johnson, had been appointed receivers. An original bill had been filed in the Southern District of New York, and an ancillary bill filed in the Northern District of Georgia, and the same receivers appointed in each case. A creditors' bill was also filed in the Superior Court of Fulton County, Georgia, against Imbrie & Company and was removed to the District Court and there consolidated with the ancillary bill. In the consolidated cause, Hosier, by leave, filed his intervention against the defendants, Imbrie & Company, the receivers, and the Fulton National Bank, which was not theretofore a party to the litigation. The relief asked for in

the intervention and granted by the District Court was an order to the Fulton National Bank to pay to the Receivers the sum of $2,656.13, and interest, and an order to the Receivers to pay said amount to the intervenor. The appellant asks a reversal of the decree, and a dismissal of the intervention, and asserts (1) that the District Court had no jurisdiction of the intervention, and (2) that it decided it erroneously on the merits.

1. The District Court would have been without jurisdiction of an original suit between the intervenor and the Fulton National Bank, there not being the requisite diversity of citizenship, nor the jurisdictional amount involved. Jurisdiction was claimed for the intervention as a dependent controversy, arising in the original creditors' bill, and if it was such a dependent controversy, jurisdiction would exist, regardless of the amount involved or the citizenship of the parties. One object of the original cause was the collection of the assets of Imbrie & Company for distribution among their creditors. On March 3rd, 1921, when the ancillary bill was filed, Imbrie & Company had on deposit with the Fulton National Bank the sum of $2,656.13, the proceeds of a check, which Hosier had given to Imbrie & Company, on February 21st, 1921, to buy certain stock for him. Imbrie & Company deposited the check to their credit and failed to buy the stock. As between Imbrie & Company and Hosier the money was still Hosier's when the bill was filed. On March 3rd, 1921, the Fulton National Bank applied the deposit account of Imbrie & Company, containing the sum named, to the indebtedness of Imbrie & Company to it. Hosier then intervened asking the District Court to order the Bank to pay the amount to the Receivers for his use. It is clear that the deposit account of Imbrie & Company was an asset of their insolvent estate, which, if it had not been claimed by Hosier, it would have been the duty of the Receivers of Imbrie & Company to reduce to possession, and this, notwithstanding, the fact that the Bank had attempted to appropriate it, by setting it off against what Imbrie & Company owed the Bank. It was to the interest of the insolvent estate to see that it was collected whether it was eventually determined that it belonged to the estate or to Hosier or to the Bank. The insolvent estate could not be intelligently liquidated and settled until it was determined to whom the money rightfully belonged in order that a proper distribution of it might be made, and the claims of the respective claimants adjusted. The interest of the Receivers in effecting a prompt liquidation of the estate, would have entitled them to file a dependent bill or intervention to have that determination made. If the receivers could have intervened, the District Court was right in authorizing Hosier to intervene, making the receivers and the Bank parties defendant to the intervention. In this proceeding all parties in interest in the controversy were brought before the court and their respective rights in the fund conclusively adjusted. Porter vs. Sabin, 149 U. S., 473; White vs. Ewing, 159 U. S., 36.

2. The question presented upon the merits is whether the right of the Fulton National Bank to set off the deposit against the indebtedness of Imbrie & Company to it is superior to the equity of Hosier, whose check was deposited by Imbrie & Company and created the fund. As Imbrie & Company used Hosier's money for their own purposes, instead of to buy him the stocks, as instructed; the money, as between them, remained the money of Hosier, even after its deposit. It is conceded that the Bank had no notice that the money was Hosier's, and further that the Bank did not change its position to its disadvantage by reason of the deposit. The question then is what are the rights of the Bank in the absence of notice to it of Hosier's equity, and when there had been no change to its disadvantage in its relation to Imbrie & Company, upon the faith of the deposit. The cases of Bank of Metropolis vs. New England Bank, 1 How. 234 and 6 How. 212, and Wilson vs. Smith, 3 How. 762, unless overruled, conclude the question. Upon the second appeal in the former case (6 How. 212) the Supreme Court, construing its former opinion in the same case, held (1) that if a bank receiving paper for collection had notice that the bank from which it received it, had no interest in it, except as a transmitting agent, it would not be entitled to retain the paper, as against the true owner; (2) that if the bank receiving the paper had no notice of its true ownership, and treated the bank from which it was received as the true owner, yet, unless it had extended credit to or suffered balances to remain in the hands of the bank from which it received it to its disadvantage, it would not be entitled to retain the paper as against the real owner; and (3) that if the receiving bank had no notice of the rights of the true owner of the paper and regarded the bank from which it received it, as the true owner, and extended credit or suffered balances to remain in the hands of the bank, from which it received the paper, to its disadvantage and on the faith of the receipt of the paper, then it could retain the paper as against the real owner.

In this case the concession was that the Fulton National Bank had no notice of Hosier's rights in the check and had not changed its position by reason of the deposit. Under the second rule, the Bank was therefore precluded from retaining the check or its proceeds as against Hosier, and its attempted offset was ineffectual.

Appellant contends that the cases cited have been departed from by the Supreme Court in more recent cases, citing National Bank vs. Insurance Company, 104 U. S. 54, and Union Stock Yrds. vs. Gillespie, 137 U. S. 411. In each of these cases, the Supreme Court entered upon an extended inquiry as to whether the Bank had notice of the character and ownership of the deposit, and the argument is that such an inquiry would have been futile if the court adhered to the previous cases, which held notice to be unnecessary. The previous cases were not mentioned in the opinions of the court in either of the later cases cited. The older cases were deliberately decided—the bank of Metropolis case having been twice considered by the court on separate appeals, and the conclusion reached upon the

first appeal having been reaffirmed upon the second. We are not prepared to say that the older cases have been overruled inferentially and without mention by the later cases. If the Supreme Court had intended to depart from the earlier cases it would not have left its intention merely to inference or implication. In each of the later cases relied upon by Appellant, the court held that the Bank had notice under the facts as to the true ownership, so that the most that may be said of those cases is that the Court reached the conclusion that the earlier cases required, but by an unnecessary process, in view of what had theretofore been decided by them.

We find no error in the record and the judgment and decree of the District Court is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed Dec. 13, 1923

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Fulton National Bank of Atlanta, and the surety on the appeal bond herein, W. J. Blalock, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 114 to 119 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4100, wherein Fulton National Bank of Atlanta is appellant and I. S. Hosier, and Theodore G. Smith et als., as Receivers of Imbrie & Company are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 113 are identical with the printed record upon which

said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of January, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

In Supreme Court of the United States, October Term, 1923

No. 750

Fulton National Bank of Atlanta, Petitioner,

vs.

I. S. Hoosier et al., Receivers of Imbrie Company

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Order Allowing Certiorari—Filed June 2, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

Fwd

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

No. 260

FULTON NATIONAL BANK OF ATLANTA,

Petitioner,

vs.

I. S. HOSIER, AND THEODORE G. SMITH, JOHN B. JOHNSTON AND EDWARD L. GILMORE, AS RECEIVERS OF IMBRIE & COMPANY,

Respondents.

BRIEF FOR THE FULTON NATIONAL BANK OF ATLANTA.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,

Attorneys for Petitioner.

JOHNSON-DALLIS CO., ATLANTA, GA.

SUBJECT INDEX.

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

FULTON NATIONAL BANK OF ATLANTA, Petitioner, VS. I. S. HOSIER, ET ALS, Respondents.	No. 260 CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE FULTON NATIONAL BANK OF ATLANTA.

STATEMENT OF THE CASE.

This case arises out of an intervention filed by I. S. Hosier in the case of Beaver Board Companies vs. Imbrie & Company, pending in the Northern District of Georgia. The main case is a general creditors' bill for the liquidation of the affairs of Imbrie & Company located in the Northern District of Georgia, it being ancillary to the principal suit in the Southern District of New York.

By his intervention Hosier sought to make the Fulton National Bank a party to said proceedings and to recover from the said Fulton National Bank a certain sum of money. The development of the case presents no controversy of fact, but only questions of law. The case was referred to a Master, and the facts ascertained by him upon uncontradicted evidence, and no exception has been taken to his findings of fact. Without, therefore, stating separately the

pleadings, the evidence, and the Master's finding, we present one statement of the ultimate facts developed in the controversy, on which the question of liability is to be determined, as follows:

On the date of the filing of the creditors' bill against Imbrie & Company that Company had on deposit with the Fulton National Bank of Atlanta a certain sum of money, and was indebted to the Fulton National Bank, on notes, largely in excess of this amount. Upon the filing of the creditors' bill the Fulton National Bank offset the amount it was due Imbrie & Company on this open deposit against the amounts Imbrie & Company were due it on notes, thus wiping out the credit to the account of Imbrie & Company and establishing a credit on the notes in an equivalent amount.

Part of this deposit to the account of Imbrie & Company was created by the deposit to their credit of a check which Hosier had given them, and out of which this controversy arises. Imbrie & Company were brokers in securities, and also dealers in securities for their own account. Hosier had given them an order to purchase for him certain stock, and had given them a check covering the purchase price of this stock. This is the check deposited by Imbrie & Company to their credit, as above referred to, and constituting a part of the balance to their credit on the date of the insolvency. They had failed to execute Hosier's order for the purchase of the stock.

The following facts are specifically found by the Master, approved by the District Court and the Circuit Court of Appeals:

(1) The bank had no notice at the time it accepted this check of Hosier's for deposit to the credit of Imbrie & Company, or at the time it charged off the balance of Imbrie &

Company, that Imbrie & Company held the check of Hosier, or the proceeds thereof, in trust, or that there was any equity or right of Hosier in said check or its proceeds. Furthermore, the facts were not such as to put the bank on constructive notice, or to charge it with a duty of inquiry as to any of said matters, but on the contrary the bank acted in the justifiable belief that the check was the unqualified and unconditional property of Imbrie & Company.

(2) The bank did not change its position in any way, or extend any credit, on the faith of the apparent balance created by the deposit of Hosier's check to the credit of Imbrie & Company.

On this state of facts the District Court and the Circuit Court of Appeals have held that Hosier's equity is superior to the right of the bank to set off the balance against the debts of Imbrie & Company, and a decree has been rendered, in substance, to the effect that Hosier recover from the bank the amount of this check.

On the above facts arises the question of substantive law presented in this case as to whether these facts entitle the secret equity of Hosier to prevail as against the bank's lien on the deposit and its right to set off the same against its notes.

There is also in this case a procedural question as to whether the District Court of the United States had jurisdiction of this intervention. The nature of the main case and the nature of the intervention have been stated. To this should be added the statement that both Hosier and the bank are citizens and residents of the Northern District of Georgia; that the amount is less than Three Thousand Dollars; and that no federal question is involved.

Decision of the Court of Appeals.

The Court of Appeals recognizes that its decision is contrary to the prevailing rule of commercial law with regard to money and negotiable instruments under these circumstances. The decision is based entirely on the view that certain very old cases, decided by this Court, require this result, namely, the decisions of this Court in **Bank of Metropolis v. New England Bank, 1 How. 234, and 6 How. 212,** and in **Wilson v. Smith, 3 How. 762.** We believe it is apparent from the decision of the Court of Appeals that the Court is itself regretful that it is unable to decide this case in accordance with the prevailing rule of commercial law, and that it feels obligated to yield to these early decisions of this Court, which are not in harmony with the prevailing rule of law on the subject. This is an inference from the decision rather than an express statement therein.

ERRORS COMPLAINED OF.

First: That the court erred in holding the bank liable to Hosier, under the facts found by the Master and shown by the undisputed evidence. It is insisted that the bank's lien and right of setoff, under the circumstances shown, is superior to the secret equity asserted by Hosier.

Second: That the court had no jurisdiction of this intervention, and no jurisdiction to make the Fulton National Bank a party, because the controversy between the intervenor and the bank is not so connected with the main suit as to be a dependent proceeding and sustained by the jurisdiction of the main suit, and neither the requisite diversity of citizenship, nor jurisdictional amount, appears in the intervention.

Secret Equity in a Bank Deposit Can Not Prevail Against the Bank's Lien.

This record presents a clearcut question of law. The conflict is between the secret equity of Hosier and the bank's lien or right of setoff. It is established and conceded that the bank had no notice of the equity of Hosier and that the facts do not justify a claim of constructive notice. The decision of the lower court is that the mere lack of notice to the bank is not sufficient to sustain its right of setoff as against a secret equity. The decision puts a further burden on the bank and requires it to show that it has acted or failed to act to its prejudice on the faith of the apparent balance. The error of this decision is that it makes the rights of the bank turn on its ability to show an estoppel, whereas the rule of law which gives superiority to the right of the bank is not based on estoppel at all, but is based on established principles with regard to money and negotiable instruments and other forms of currency as a fluid medium of exchange whereby the taker of such property, in due course, and without notice, is protected from secret equities.

It is our contention, as will be more fully developed, that the decision in this case is, therefore, contrary to sound principles of commercial law.

It is further our contention that the decision is unfortunate in that it places the Federal courts in the attitude of maintaining a doctrine on an important question of commercial law which is out of harmony with the doctrine of the state courts and the doctrine of the English courts—in a word, it places the Federal courts in conflict with all other courts whose jurisprudence is founded upon the common law. It needs no argument to show that it is unfortunate for such a conflict to exist and for the commercial rights of

litigants to depend upon whether their case is located in a Federal or state court.

We turn first to a consideration of the case law on this subject, laying aside for the moment the decisions of the various Federal tribunals.

The cases next cited show that it is fully established in the state courts that the right of a bank to set off the balance of a depositor against the debts of the depositor is superior to a secret equity of a third person in the deposit, without regard to whether the bank has acted or failed to act to its prejudice on the faith of the apparent balance.

CALIFORNIA.

Willey v. Crocker-Woolworth Nat. Bk. (1904) 141 Cal. 508, 75 Pac. 106.

Arnold v. San Ramon Valley Bk., 184 Cal. 632; 194 Pac. 1012; 13 A. L. R. 320.

The Arnold case is the stronger and clearer in its application to the point involved. See its discussion of the Willey case.

See also, the full casenote to the report in **13 A. L. R. 320.**

American Surety Co. v. Bank of Italy, 62 Cal. App. 149; 218 Pac. 466.

IDAHO.

Cunningham v. Bank of Nampa, (1907), 13 Idaho, 167; 10 L. R. A. (N. S.) 706; 121 Am. St. Rep. 257, 88 Pac. 975.

(This case is frequently cited to this point. It is not clear, however, that the point is really involved.)

INDIANA.

McEwen v. Davis, (1872), 39 Ind. 109.

IOWA.

Allen v. Brown, (1874), 39 Ia. 330.

Smith v. Crawford Co. St. Bk., (1894), 99 Ia. 282, 61 N. W. 378, on rehearing in (1896), 99 Ia. 288, 68 N. W. 690.

Smith v. Des Moines Nat. Bak. (1899), 107 Ia. 620, 70 N. W. 238.

KANSAS.

First Natl. Bk. v. Valley St. Bk. (1899), 60 Kan. 621, 57 Pac. 510.

Kimmel v. Bean (1904), 68 Kan. 598, 64 L. R. A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118.

Tough v. Citizens St. Bk. (1913), 89 Kan. 583, 132 Pac. 174.

MARYLAND.

First Nat. Bk. v. Kennedy (1911), 116 Md. 24, 81 Atl. 227 Ann. Cas. 1913B, 1337.

The court points out that its conclusion inevitably follows from the rule that a bank taking notes, currency, and negotiable property as security for a pre-existing debt, is a holder for value and protected against secret equities; and follows **Maitland v. Bank, 41 Md. 620, 18 A. R. 620,** where the early cases are reviewed.

MASSACHUSETTS.

School District v. First Nat. Bk. (1869), 102 Mass. 174.

Wood v. Boylston Nat. Bk. (1880), 129 Mass. 358, 37 Am. Rep. 366.

MICHIGAN.

Garrison v. Mich. Trust Co. (1905), 139 Mich. 392, 70 L. R. A. 615, 111 Am. St. Rep. 407, 102 N. W. 978, 5 Ann. Cas. 813.

(The Garrison case is squarely in point. It cites the Bank of Metropolis case in another connection and ignores the fact that on the point under discussion it conflicts with what the Michigan court is holding.)

MISSOURI.

First Nat. Bk. v. City Nat. Bk. (1903), 102 Mo. App. 357, 76 S. W. 489.

Sparrow v. State Exch. Bk. (1903), 103 Mo. App. 338, 77 S. W. 168.

Mooney v. Chicago, B&Q R. Co. (1907), 125 Mo. App. 651, 103 S. W. 119.

Moore v. First Nat. Bk. (1911), 154 Mo. App. 516, 135 S. W. 1005.

Wilson v. Farmers' First Nat. Bk. (1914), 176 Mo. App. 73, 162 S. W. 1047.

NEBRASKA.

Globe Savings Bk. v. Nat. Bk. of Commerce, 64 Neb. 413, 89 N. W. 1030.

(An earlier Nebraska case has been said to state a different rule. This case, however, clearly makes notice essential to defeat the right of the bank.)

NEVADA.

McStay Supply Co. v. Stoddard (1912), 35 Nev. 284, 132 Pac. 545.

(This case presents a convincing collection of authorities in support of the rule contended for.)

NEW YORK.

Hatch v. Fourth Nat. Bk. (1895), 147 N. Y. 184, 41 N. E. 403, affirming (1894), 82 Hun. 515, 31 N. Y. Supp. 530.

Hutchinson v. Manhattan Co. (1896), 150 N. Y. 250, 44 N. E. 775.

Meyer v. N. Y. County Nat. Bk. (1899), 36 App. Div. 482, 55 N. Y. Supp. 504.

London & River Plate Bk. v. Hanover Nat. Bk. (1899), 36 App. Div. 487, 55 N. Y. Supp. 941.

Carlisle v. Norris, 215 N. Y. 400, 109 N. E. 564.

NORTH DAKOTA.

Shuman v. Citizens St. Bk. (1914), 27 N. D. 599, L. R. A. 1915A, 728, 147 N. W. 388.

PENNSYLVANIA.

Laubach v. Leibert, (1878), 97 Pa. 55.

(Only indirectly applicable).

There are decisions to the contrary by the Texas Court of Civil Appeals, and the Supreme Court of South Dakota, but there were dissents in each court.

The rule, as stated by us, is recognized by the encyclopedias.

7 C. J. 659-660.

3 R. C. L. 584-585.

It is also the recognized rule in the English Courts. The following cases from those courts will be found to present a full and clear consideration of the fundamental principles of commercial law on which the doctrine rests.

Griggs v. Cocke, (1831), 4 Sim. 438, 58 Eng. Reprint 163.

Hawks v. Howard, (1847), 10 L. T. 2.

Thomson v. Clydesdale Bk. (1893), A. C. 282, 62 L. J. P. C. N. S. 91, 1 Reports 255, 67 L. T. N. S. 156.

Union Bk. v. Murray-Aynsley (1898), A. C. 693, 67 L. J. P. C. N. S. 123.

Bank of New South Wales v. Goulburn Valley Butter Co., (1902), A. C. 543, 71 L. J. P. C. N. S. 112, 87 L. T. N. S. 88, 51 Week. Rep. 367, 18 Times L. R. 735.

See also, the decision in Ireland in, **Re: Reynolds, (1895), 1 Ir. R. 83.**

So much for a statement of the case law, other than that in the Federal courts. There cannot be room for argument over the proposition that the rule as stated by us is overwhelmingly sustained by authorities. The decision to the contrary in this case by the Circuit Court of Appeals is based on the view that they were constrained so to hold on account of the Bank of Metropolis case by this Court in 1 How. 212. We do not concede that this early case still represents the rule here followed. On the contrary we insist that the case of the Bank of Metropolis is in conflict

with, and has, inferentially, been overruled by, two later cases decided by this Court, namely:

Central Nat. Bk. v. Conn. Mut. Life Ins. Co., 104 U. S. 54.

Union Stock Yards v. Gillespie, 137 U. S. 411.

Each of these cases presented a conflict between an equity claimed by a third person in a bank deposit and the bank's lien against the deposit. In the Central National Bank case the decision states the existence of such a lien in the most emphatic language, and then continues:

> "It attaches to such securities and funds, not only against the depositor, but against the **unknown equities of all others in interest,** unless modified or waived by some agreement, express or implied, or conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive." (Bold face type by us).

The language of the Gillespie case is substantially to the same effect.

A careful reading of these two cases negatives any suggestion of the conflict being determined on the basis of an estoppel. Notice, and notice alone, is the basis for defeating the bank's rights.

It was insisted in the lower courts that what was said by this court in the two cases just cited, that notice was essential to defeat the bank's rights, should be treated as obiter. The basis of the contention was that since in both of these cases this court found that notice was chargeable to the bank, therefore, the statement of the court, that notice was essential, should be treated as dicta.

The argument proceeds upon a misconception as to what constitutes obiter dicta. The cases involved two questions: First: Was notice essential where there was no effort to show that the bank had acted, or failed to act, to its prejudice? Second: Was notice shown? A decision upon each point was necessary. Indeed, until the court held that notice was essential, (bearing in mind always that there was no claim of estoppel by acting or failing to act), the court could never reach the question of whether notice was shown. This court has settled whether a ruling under these circumstances can be treated as dicta. Where a point is decided by the court it cannot be treated as dicta, because some other point might have controlled the decision.

Railroad v. Shulte, 103 U. S. 116.

Union Pacific Co. v. Mason City Co., 199 U. S. 160.

Tested by this rule, the decisions in the Central National Bank case, and in the Gillespie case, that notice is essential to defeat the bank's lien and right of setoff, even though it is not shown that the bank had acted, or refrained from acting to its prejudice, cannot be treated as dicta, but must be treated as ruling this specific point. So treated, there is a conflict between the decision in the Bank of Metropolis case and these later decisions of this court.

What is the effect of such a conflict? This question, also, is answered by the decisions of this court. Later cases of this court in conflict with earlier cases have the effect of overruling such earlier cases, even though the earlier cases are not mentioned by name.

Asher v. Texas, 128 U. S. 129.

We quote from this case as follows:

"We had supposed that a later decision in conflict

with prior ones had the effect to overrule them, whether mentioned and commented on or not."

It is therefore submitted that this court has already overruled the early case of the Bank of Metropolis and placed itself in harmony with the state courts and the English courts on this question.

This view of the decisions of this court has apparently been accepted by the federal courts prior to the decision in the instant case. See:

Union Stock Yards Nat. Bk. v. Moore, 79 Fed. 705.

In re: Evans, 187 Fed. 720 (4).

Security Bank & Trust Co. v. Geren, 238 Fed. 317.

We have thus presented an outline of the case law on the subject. We believe it demonstrates that the rule in the federal courts and in this court is the same as the rule in the state courts and English courts, and is in accordance with the proposition which we submit. Certainly it demonstrates that this rule is unalterably established in the state courts. Our opponents do not and can not question this proposition. If there is any doubt about the rule established by prior decisions of this court the present case furnishes an opportunity to relieve that doubt and to bring harmony between the two classes of tribunals which is so greatly to be desired in commercial law. We believe the certiorari was granted for this purpose, and we believe we could safely rest the case with the demonstration of the extent to which this rule is embedded in the jurisprudence of the

several states. It is possible for this court to bring about a state of harmony. Practically, it is impossible to accomplish this through any effort to overturn the large number of state decisions in many different tribunals. If there is to be uniformity of law on this subject it can be brought about by this court alone. At the present time at least the best legal thought regards jurisprudence as a practical means of meeting the needs of a society rather than an intellectual game of spinning out conclusions with metaphysical nicety from abstract principles. It is, therefore, more important to accomplish a practical working harmony between state and federal courts on this subject than it is to determine which view might be correct if the case were one of first instance.

It is, however, comparatively easy to point out that on principle as well as on authority the bank's right of setoff is superior to a secret equity and that this right of setoff is entirely independent of any element of estoppel and can be defeated only by showing notice, express or implied.

The principles involved do not relate to any balancing of equities between the parties but grow out of a rule of policy which treats money, negotiable instruments, etc. as a fluid medium of exchange, passing to those who receive it in good faith, free of any secret defects in the title of the apparent holders.

The doctrine is at least as old as the decision of Lord Mansfield in Miller v. Race, 4 Burrows, 452, in which he said: "The true reason is upon account of the currency of

it. It cannot be recovered after it has passed into currency."

Reference may be made to **Stephens v. Board, 79 N. Y. 183,** for a clear statement of the rule of policy involved, as follows:

> "It is absolutely necessary, for practical business transactions, that the payee of money, in due course of business, shall not be put upon inquiry, at his peril, as to the title of the payor. . . . It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person, who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business, and in good faith, upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. 'Money', said Lord Mansfield in Miller v. Race, before cited, 'shall never be followed in the hands of a person who, bona fide, took it in the course of currency, and in the way of business.' "

See: **Holley v. Domestic, Etc. Society, 180 U. S. 284, 45 L. ed. 531,** to the same effect, and quoting the foregoing from Stephens v. Board.

In **Rankin v. Chase National Bk., 188 U. S. 557,** an effort was made to recover money which had been embezzled and applied by the thief in payment of a pre-existing debt. There was no question of the creditor having prejudiced his position on the faith of the payment and no element

of estoppel was involved. This court made no effort to balance the equities of the parties, but rested its decision, refusing a recovery on the established rule of business law, which, for reasons of policy, maintains the currency of media of exchange, saying: "That under such conditions repayment cannot be exacted is elementary."

So negotiable instruments, negotiable bonds, etc., when stolen and placed as collateral security for a pre-existing debt of the thief, cannot be recovered by the true owner from the party to whom they were thus pledged.

Brooklyn National Bank v. Citizens Gas. Co., 45 Atl. 361, 72 Conn. 576.

Thompson-Houston Electric Co. v. Capital Electric Co., 65 Fed. 341, from the Circuit Court of Appeals of the Sixth Circuit. Decision by the present Chief Justice.

National City Bank v. Wagner, 216 Fed. 473, from the Circuit Court of Appeals of the Seventh Circuit.

As to the general proposition that title to stolen negotiable bonds and instruments passes to any taker for value in due course see the note in **19 L. R. A. (N. S.) 106.**

The basic idea, that money and commercial paper are a species of property sui generis, in that they pass from apparent holders to takers for value without regard to defects in the title of the apparent holders, or secret equities of third persons, was announced fully by this court as early as

Murray v. Lardner, 2 Wall. 110.

See citations in **5 Rose's Notes, pages 870-873.**

Taking in payment of a pre-existing debt constitutes the person so taking a holder for value.

Swift v. Tyson, 16 Pet. 1.

Citations in 3 **Rose's Notes, 638-644.**

And taking as security for a pre-existing debt has the same effect.

Brooklyn, Etc. Co. v. National Bank of Republic, 102 U. S. 14.

Citations in **11 Rose's Notes, pages 4-12.**

These are three leading cases in this country. They really constitute landmarks in the development of our commercial law. The extent to which they have been applied and followed is shown by the Annotations in Rose's Notes above.

Therefore, had Imbrie taken Hosier's check to the bank and applied it directly in payment in part of Imbrie's indebtedness to the bank there could have been no question but that the bank could have retained the payment as against Hosier's claim. What actually happened was in substance the same. The check first created a credit to Imbrie & Company in the due course of business and then likewise in due course of business this credit was applied to the payment of Imbrie's debt.

It must be borne in mind that the law implies the consent of the depositor for his deposit to be applied in payment of his debt on its maturity or on the insolvency of the depositor, and that the application is thus as directly with the consent of the depositor as if the sum originally deposited had been applied in the first instance in payment and not passed through the form of a deposit and chargeoff.

This implied consent of the depositor is the basis of the socalled "banker's lien."

A bank has a lien on all funds of its depositor, including his balance with it, and upon commercial paper and security belonging to him, to secure any debts to it from such depositor

Reynes v. Dumont, 130 U. S. 354.

Joyce v. Auten, 179 U. S. 591.

National Bank v. Insurance Co., 104 U. S. 54.

7 C. J. 659, et seq.

3 R. C. L., 584.

There has been some discussion in the law books as to whether this right is a true lien. In the cases referred to this court describes it as a lien. Perhaps the most accurate description of the right is the statement of the Circuit Court of Appeals of the First Circuit in the late case of **Merrimac National Bank v. Bailey, 289 Fed. 468**, that the right constitutes "an inchoate lien", existing the moment of a deposit, and coming into active operation on the maturity of the depositor's debt, or on the depositor's insolvency.

Treating the bank's lien as a form of security against the deposit (it being immaterial whether the right is for a while "inchoate"), from the minute the deposit of the check was made the bank received the same and its proceeds as security for its debt, and is protected against the secret equities of third persons.

Treating the bank's lien as a mere consent to the charge-off under such circumstances as arose in this case, the correct view of the situation then is that presented fully by the New York courts in the cases set out in the tabulation of authorities heretofore presented, namely, that the whole transaction is a mere method of applying the check, with the consent of the depositor, in payment of the depositor's

debts, and, therefore, within the rule that money, negotiable instruments, etc., applied in payment of an existing debt cannot be recovered by the secret owner.

In a word, the superiority of the bank's right in the absence of notice grows out of established rules of law as to the nature of certain property as a medium of currency. The doctrine is one based on considerations of business policy. These considerations are overwhelmingly established and cannot now be questioned. The doctrine has nothing to do with estoppel or balancing equities between immediate parties.

We have already pointed out the practically unanimous state of the authorities in the state and English courts. It is now submitted that these courts have correctly applied the principles of law that relate to the questions involved. For a more elaborate discussion of these principles the court is referred to the authorities cited, and particularly to the New York and the English cases where the matter has received the clearest consideration.

We have pointed out that the law implies a consent to a chargeoff under these circumstances. In addition to this, however, in the immediate case, the consent of Imbrie & Company to such a chargeoff, and a contract lien of the bank against the deposit of Imbrie & Company, was expressly set out in one of the notes signed by Imbrie & Company, with the provision that this lien should apply not only to that note but to all other debts of Imbrie & Company. (See Transcript of Record, pages 101-102).

Part of the debt of Imbrie & Company to the bank was in the shape of a demand note; part was in the shape of unmatured notes; but the fact that the maturity date of the notes had not been reached in no way affects the bank's

right of setoff, because, admittedly, Imbrie & Company had become insolvent at the time of the setoff and receivers had been appointed for them in the district in which their main office was located, but not in the Northern District of Georgia. The insolvency of a depositor matures his notes and matures the bank's right of setoff.

Shuler v. Israel, 120 U. S. 586, 30 L. ed. 707.

Georgia Seed Co. v. Talmadge, 96 Ga. 256.

7 C. J. 656, et cit.

Note in Ann. Cas. 1915-A, 689, et cit.

THE COURT HAD NO JURISDICTION OF THE INTERVENTION.

The main suit in which Hosier presented his intervention was an ancillary proceeding to administer the assets of Imbrie & Company in the Northern District of Georgia. The controversy between Hosier and the bank presents no diversity of citizenship, nor does it involve the jurisdictional amount. The Federal court had jurisdiction of it only if it can be regarded as a "dependent controversy" sustained by the jurisdiction of the main suit.

It is, of course, fully settled that a Federal court properly acquiring jurisdiction may entertain, by intervention, all dependent controversies, without regard to such controversies, presenting in themselves the grounds of federal jurisdiction. It is equally well settled that no intervention pro interesse suo can be sustained as a "dependent controversy" unless the subject matter of the

controversy is property or assets which have been drawn into the court's possession, actually or constructively, by the main suit in which the intervention is presented. All of these matters are well established and not controverted in the present case. The difficulty, if any, arises over the application of undisputed principles. For a general summary of the law on the subject, and a citation of the cases to sustain it, see: **Simpkins Fed. Practice, p. 740-741.**

The question of jurisdiction, therefore, is dependent on whether the property over which Hosier and the bank were litigating was constructively drawn into the custody of the federal court in the suit to administer Imbrie's assets; this property being the bank deposit in the Fulton National Bank.

Whatever else may be true about this case there can, we think, be no question but that on no theory did the deposit charged off by the bank belong to Imbrie & Company. As against Imbrie & Company the right of the bank is certain. The discussion and cases heretofore referred to on the bank's lien and right of setoff are conclusive in this respect.

If the bank's right of setoff is superior to Hosier's secret equity the deposit was extinguished and belonged to no one. If the contrary of this proposition is true the deposit belonged to Hosier. These are the only two possible theories, and under neither of them did the deposit belong to Imbrie & Company. Therefore it was not an asset which the receivers of Imbrie & Company are entitled to collect, and it

was not an asset which was drawn into the custody of the Federal court by the bill to administer Imbrie's assets.

The conclusion is then inevitable that the controversy between Hosier and the bank over this chose in action was not a controversy over property drawn into the custody of the court in the main bill, and was not, therefore, a dependent controversy or within the jurisdiction of the Federal court.

Union Electric Securities Co. v. La. Electric Co., 68 Fed. 673, (C. C. A. 5th Circuit).

Forest Oil Co. v. Crawford, 101 Fed. 849, (C. C. A. 3rd Circuit).

Newton v. Gage, 155 Fed. 598.

Venner v. Pa. Steel Co., 250 Fed. 290.

Mass. Loan & Trust Co. v. Kansas City R. R. Co., 101 Fed. 30.

Continental, Etc. Co. v. Alice Chalmers Co., 200 Fed. 601.

It has been asserted that the receivers were interested in the controversy between Hosier and the bank because the result of that controversy would determine the amount of obligations of the receivers to the respective parties. It would not, of course, affect the aggregate amount of the receivers' obligations because the extent to which Hosier's claim was reduced, if he recovered from the bank, would automatically increase the amount of the bank's claim. A mere remote interest of this kind in the receivers is not sufficient to abrogate the rule that an intervention pro

interesse suo is not a "dependent controversy" unless it relates to property drawn into the constructive custody of the court by the main bill. The connection suggested is too remote.

Carey v. McMillan, 289 Fed. 380.

Respectfully submitted,

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Petitioner.

P. O. Address
Atlanta, Georgia.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 260.

FULTON NATIONAL BANK OF ATLANTA,
PETITIONER,

vs.

I. S. HOSIER ET ALS., RESPONDENTS.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE FULTON NATIONAL BANK OF ATLANTA.

The brief of opposing counsel undertakes to distinguish several of the state cases cited by us, upon the ground that in them it appeared that the application of the deposit to the depositor's debt was with the consent of the depositor. It is, however, apparent that the depositor's express consent can make no difference, because, as pointed out in our

original brief, the banker's lien is at least a consent, implied in law, for the deposit to be thus applied, under such circumstances as arose in the present case. (See our original brief, pages 17, 18 and 19.)

However, in the present case the question of the effect of the express consent of the depositor, while interesting as bearing on the correct principles of law to be established by this decision, is merely academic for the reason that *the record shows the express consent of Imbrie & Company for the deposit to be thus applied, in that it was a part of their contract, as embodied in their notes, for such application to be made.* (See transcript of record, pages 101-102. Also our brief, page 19.)

Respectfully submitted,

JNO. D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Petitioner.

No. 260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

FULTON NATIONAL BANK OF ATLANTA,

Petitioner,

versus

I. S. HOSIER, and THEODORE G. SMITH, JOHN B. JOHNSTON, AND EDWARD L. GILMORE, AS RECEIVERS OF IMBRIE & COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Petitioner.

Atlanta, Georgia.

In The Supreme Court Of The United States

FULTON NATIONAL BANK OF ATLANTA,

Petitioner,

vs.

I. S. HOSIER, and THEODORE G. SMITH, JOHN B. JOHNSTON and EDWARD L. GILMORE, AS RECEIVERS OF IMBRIE & COMPANY,

Respondents.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner respectfully petitions that a writ of certiorari may be granted to it directing the United States Circuit Court of Appeals for the Fifth Circuit to certify to this Court for its review and determination the case of your petitioner as appellee against the above named respondents as appellants, and for reasons therefor respectfully shows the following:

STATEMENT OF THE CASE.

This case arises out of an intervention filed by I. S. Hosier in the case of Beaver Board Companies vs. Imbrie & Company, pending in the Northern District of Georgia. The main case is a general creditors' bill for the liquidation of the affairs of Imbrie & Company located in the Northern Dis-

trict of Georgia, it being ancillary to the principal suit in the Southern District of New York.

By said intervention Hosier sought to make the Fulton National Bank a party to said proceedings and to recover from the said Fulton National Bank a certain sum of money. The development of the case presents no controversy of fact, but only questions of law. The case was referred to a Master, and the facts ascertained by him upon uncontradicted evidence and no exception has been taken to his findings of fact. Without, therefore, stating separately the pleadings, the evidence, and the Master's finding, the petitioner presents one statement of the ultimate facts developed in the controversy, on which the question of liability is to be determined, as follows:

On the date of the filing of the creditors' bill against Imbrie & Company that Company had on deposit with the Fulton National Bank of Atlanta a certain sum of money, and was indebted to the Fulton National Bank, on notes, largely in excess of this amount. Upon the filing of the creditors' bill the Fulton National Bank offset the amount it was due Imbrie & Company on this open deposit against the amounts Imbrie & Company were due it on notes, thus wiping out the credit to the account of Imbrie & Company and establishing a credit on the notes in an equivalent amount.

Part of this deposit to the account of Imbrie & Company was created by the deposit to their credit of a check which Hosier had given them, and out of which this controversy arises. Imbrie & Company were brokers in securities, and also dealers in securities for their own account. Hosier had given them an order to purchase for him certain stock, and had given them a check covering the purchase price of this stock. This is the check deposited by Imbrie & Company to their credit, as above referred to, and constituting a part of the balance to their credit on the date of the insolvency.

They had failed to execute Hosier's order for the purchase of the stock.

The following facts are specifically found by the Master, approved by the District Court and the Circuit Court of Appeals:

(1) The bank had no notice at the time it accepted this check of Hosier's for deposit to the credit of Imbrie & Company, or at the time it charged off the balance of Imbrie & Company, that Imbrie & Company held the check of Hosier, or the proceeds thereof, in trust, or that there was any special equity or right of Hosier in said check or its proceeds. Furthermore, the facts were not such as to put the bank on constructive notice, or to charge it with a duty of inquiry as to any of said matters, but on the contrary the bank acted in the justifiable belief that the check was the unqualified and unconditional property of Imbrie & Company.

(2) The bank did not change its position in any way, or extend any credit, on the faith of the apparent balance created by the deposit of Hosier's check to the credit of Imbrie & Company.

On this state of facts the District Court and the Circuit Court of Appeals have held that Hosier's equity is superior to the right of the bank to set off the balance against the debts of Imbrie & Company, and a decree has been rendered, in substance, to the effect that Hosier recover from the bank the amount of this check.

DECISION OF THE COURT OF APPEALS.

The decision of the Court of Appeals recognizes that this result is contrary to the prevailing rule of commercial law with regard to money and negotiable instruments under these circumstances. The decision is based entirely on the

view that certain very old cases, decided by this Court, require this result, to-wit, the decisions of this Court in **Bank of Metropolis v. New England Bank,** 1 How. 234, and 6 How. 212, and in **Wilson v. Smith,** 3 How. 762. We believe it is apparent from the decision of the Court of Appeals that the Court is itself regretful that it is unable to decide this case in accordance with the prevailing rule of commercial law, and that it feels obliged to yield to these early decisions of this Court, which are not in harmony with the prevailing rule of law on the subject. This is an inference from the decision rather than an express statement therein.

QUESTION OF GENERAL IMPORTANCE.

As will appear from the attached brief, it is now universally recognized that secret equities of third persons in a bank deposit cannot prevail against the bank's right of setoff against the depositor. The fact that the bank has not acted to its prejudice, on the faith of the deposit, is immaterial, since its superior right does not rest upon any question of estoppel, but upon the general rule of commercial law, that money and negotiable instruments pass from apparent holders without regard to secret equities of others, and that a bank accepting such money or instruments for deposit becomes the holder thereof for value with the right to setoff the deposit against existing debts of the depositor. This is the general rule in this country and in England. The question is an important question of commercial law, involving, as it does, the basic considerations as to the nature of money and commercial paper in this respect. The frequency with which it arises is shown by the number of cases cited in the attached brief.

It is conceded that the **Bank of Metropolis** case announced a different rule. This was many years ago, and long before the present doctrine had become fully established.

It is contended that the **Bank of Metropolis** case has clearly been departed from by this Court in **Central National Bank v. Conn. Mut. Life Ins. Co.**, 104 U. S. 54, and in **Union Stock Yards Bank v. Gillespie**, 137 U. S. 411.

The Court of Appeals recognizes the apparent inconsistency between what is said in these later cases and what was ruled in the Bank of Metropolis case, but holds that it is unable to treat the later cases as overruling the **Bank of Metropolis** case and as bringing this Court into harmony with the prevailing rule of commercial law because the later cases do not, in express terms, overrule the earlier decision. This question, therefore, arises:

Are the Federal Courts to treat the decision of the Bank of Metropolis case as still binding and as requiring them to adopt a rule of commercial law, with regard to secret equities in bank deposits, which is contrary to the rule adopted in practically every other jurisdiction founded on the common law? The Court of Appeals has held itself to be thus bound, without questioning the fact that such a rule is entirely out of harmony with what is universally recognized by other courts.

If the Court of Appeals is correct in saying that it is bound by the Bank of Metropolis case, should not that case now be formally overruled by this Court so as to bring the Federal Courts into harmony with the State and English Courts on this important question of commercial law? Is the right of a bank, and the right of a third person claiming an equity in a deposit, under these circumstances, to be dependent upon whether or not the question is to be decided by the State or Federal Courts? It is a matter of grave importance for a different rule of commercial law to be applied in the Federal Courts from that which is applied in the State Courts.

The many objections, from a standpoint of general jurisprudence, for such a conflict to exist are apparent; and inasmuch as the conflict is founded upon some very ancient decisions, which it is respectfully submitted have been departed from in later cases, the question is, therefore, one of general importance, such as to justify a review by this Court, even under its stringent rules as to the limited circumstances under which this extraordinary writ will be granted.

CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS.

The decision in the instant case is, in effect, in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in **Union Stock Yards Natl. Bank v. Moore**, 79 Fed. 705, in which the Court held that notice to the bank was essential to defeat its right of setoff. The instant case held that the right may be defeated in the absence of notice unless the bank can establish an estoppel.

Petitioner has no right of appeal or writ of error to this Court. The judgment of the Court of Appeals is final. Due notice of this application has been given to the opposing parties, who, or their counsel, have been furnished copies of this petition, and of the brief which is attached hereto. A certified copy of the record and proceedings has been filed herewith as required by the rules.

Wherefore, petitioner respectfully prays that this pe-

tition for a writ of certiorari be granted, and that the judgment be reviewed and reversed.

Jno. D. Little Arthur Powell
Signed Marion Smith Max F. Goldstein

Attorneys for Petitioner.

GEORGIA, FULTON COUNTY.

In person appeared Marion Smith, who on oath says that he is one of the counsel for the petitioner in the foregoing petition for a writ of certiorari, and that he prepared the said petition, and is personally cognizant of the facts therein recited, and the allegations thereof are true, as he verily believes.

Signed Marion Smith

Sworn to and subscribed before me
this the 31 day of December, 1923.

Signed M E Grace

Notary Public, Fulton County, Ga.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The right of a bank to setoff the amount due its depositor against the debts of its depositor is superior to secret equities of third persons claiming an interest in the deposit. Notice to the bank is essential to defeat this right. This rule is universally recognized in the American States, with the exception of decisions by divided benches in the Texas Court of Civil Appeals, the Supreme Court of Nebraska, and the Supreme Court of South Dakota. The foregoing statement is established by the following decisions:

Willeys v. Crocker-Woolworth N. Bank, 141 Cal. 508, 75 Pac. 106.

Cunningham v. Bank of Nampa, 13 Idaho, 167, 10 L. R. A. (N. S.) 706, 121 Am. St. Rep. 257.

McEwen v. Davis, 39 Ind. 109.

Allen v. Brown, 39 Iowa, 330.

Smith v. Crawford County St. Bank, 99 Ia. 282, 61 N. W. 378.

First National Bank v. Valley State Bank, 60 Kan. 621, 57 Pac. 510.

Kimmel v. Bean, 68 Kan. 598, 64 L. R. A. 785, 104 Am. St. Rep. 415.

Touch v. Citizens State Bank, 89 Kan. 583, 132 Pac. 174.

First National Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913-B, 1337.

School Dist. v. First National Bank, 102 Mass. 174.

Wood v. Boylston Natl. Bank, 129 Mass. 358, 37 Am. Rep. 366.

First National Bank v. City National Bank, 102 Mo. App. 357, 76 S. W. 489.

Sparrow v. State Exchange Bank, 103 Mo. App. 338, 77 S. W. 168.

Mooney v. Chicago B. & Q. R. R. Co., 125 Mo. App. 651, 103 S. W. 119.

Moore v. First National Bank, 154 Mo. App. 516, 135 S. W. 1005.

Wilson v. Farmers' First Natl. Bank, 176 Mo. App. 73, 162 S. W. 1047.

McStay Supply Co. v. Stoddard, 35 Nev. 284, 132, Pac. 545.

Hutchinson v. Manhattan Co., 150 N. Y. 250, 44 N. E. 775.

Meyers v. N. Y. Co. Natl. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504.

London & River Plate Bank v. Hanover Natl. Bank, 36 App. Div. 487, 55. N. Y. Supp. 941.

Shuman v. Citizens State Bank, 27 N. D. 599, L. R. A. 1915-A, 728.

Lauback v. Leibert, 87 Pa. 55.

The rule as above stated is recognized by the encyclopedias.

7 C. J. 659 and 660.

3 R. C. L. 584, 585.

It is also the recognized rule in the English Courts.

Grigg v. Cocke, 4 Sim. 438, 58 Eng. Reprint 163.

Hawks v. Howard, 10 L. T. 2.

Thomson v. Cladesdale Bank, 1893 A. C. 282, 62 L. J. P. C. N. S. 91, 1 Reports 255, 67 L. T. N. S. 156.

Union Bank v. Murray-Aynsley, 1898 A. C. 693, 67 L. J. P. C. N. S. 123.

Bank of New South Wales v. Goulburn Valley Butter Co., 1902 A. C. 543, 71 L. J. P. C. N. S. 112, 87 L. T. N. S. 88, 51 Week. Rep. 367, 18 Times L. R. 735.

This rule arises out of fundamental principles that have been recognized in many decisions of this Court.

Money and commercial paper are a species of property sui generis. They pass from apparent holders to purchasers for value without regard to defects in the title of the apparent holder, or secret equities of third persons.

Murray v. Lardner, 2 Wall. 110.

See also citations to this case in 5 **Rose's Notes,** pages 870 through 873.

Taking in payment of a pre-existing debt constitutes the person so taking a holder for value, even though no new consideration is furnished.

Swift v. Tyson, 16 Peters 1.

See citations in 3 **Rose's Notes,** 638 through 644.

And taking as security for a pre-existing debt has the same effect, though no new consideration is furnished.

Brooklyn, Etc. Co. v. National Bank of the Republic, 102 U. S. 14.

See citations in 11 **Rose's Notes,** pages 4 through 12.

The balance of a depositor in a bank is security for his debts, both pre-existing and after created debts. And a bank taking money or commercial paper for deposit becomes the holder thereof for value as such security and within the protection of the principle just announced.

7 C. J. 659, et seq.

3 R. C. L. 584.

This principle is announced and completely discussed in **Central National Bank v. Conn. Mutual Life Ins. Co.,** 104 U. S. 54.

See also, the discussion of the status of a holder of such commercial paper in **Holly v. Domestic, Etc. Society,** 180 U. S. 284.

The Bank of Metropolis case is in conflict with the principles announced in later cases of this Court, particularly in conflict with the following cases:

Central National Bank v. Conn. Mutual Ins. Co., 104 U. S. 54.

Union Stock Yards v. Gillespie, 137 U. S. 411.

The decisions in these later cases, that notice is essential, cannot be treated as dicta, because it was also found that notice was given. Where a point is decided by this Court it is not to be treated as dicta, because some other point might have controlled the decision.

Railroad v. Schulte, 103 U. S. 116.

Union Pacific Railway Co. v. Mason City Co., 199 U. S. 160.

Later cases of this Court in conflict with earlier cases

have the effect of overruling such earlier cases, even though the earlier cases are not mentioned by name.

Asher v. Texas, 128 U. S. 129.

Prior to the decision in the immediate case, the earlier decision of this Court in the Bank of Metropolis case has not been treated by the Federal Courts as a binding decision, but on the contrary they have treated the question as controlled by whether notice was given, which is in accord with the universal rule of law.

See

Union Stock Yards Natl. Bank v. Moore, 79 Fed. 705.

In re Evans, 187 Fed. 720 (4).

Security Bank & Trust Co. v. Geren, 238 Fed. 317.

The New York Courts have developed the question of commercial law involved in this discussion very fully, and in accordance with the prevailing rule heretofore referred to.

Hatch v. National Bank, 147 N. Y. 184, 41 N. E. 403.

Stephens v. Board of Education, 79 N. Y. 183.

Carlisle v. Norris, 215 N. Y. 400, 109 N. E. 1067.

Goshen National Bank v. State, 141 N. Y. 379, 36 N. E. 316.

Meyer v. N. Y. Co. Natl. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504.

We refer particularly to the New York cases, because the leading case in that State is the Hatch case, which is quoted from elaborately, with approval by this Court, in the case of **Holly v. Domestic, Etc. Society**, supra.

The case at bar has been decided contrary to the principles and authorities cited in this brief. The Court has held that a secret equity will prevail against the bank. It has announced that this holding is required by certain cases, decided by this Court nearly one hundred years ago, and never since that time cited to this point or followed by this or any other Federal Court. The decision of the Circuit Court of Appeals, however, if allowed to stand, will be taken by other Federal Courts as reviving the doctrine of the Bank of Metropolis case and as controlling on the Federal Courts. So taken it will result in the Federal Courts following, on this important question of commercial law, a rule directly contrary to that followed by the State Courts, and recognized by the text writers, and followed by the English Courts. It is respectfully submitted that such a result should be avoided, if possible, and that the confusion resulting from such conflict should be settled. It is a matter of general importance for the jurisprudence of this country that a party's rights should not be governed by totally different rules in the Federal and State Courts.

We urge the granting of the writ in this case in the interest of an important question of the general jurisprudence of this country, and to put an end to an unfortunate conflict between State and Federal Courts on a question of commercial law.

If the Circuit Court of Appeals is correct in holding that the Bank of Metropolis case has not been, in effect, overruled by later decisions of this Court, then that case—decided before the true rule of law on the subject had been established and recognized—will likewise be treated as binding on all other Federal Courts, and this Court alone can review the situation.

If the Circuit Court of Appeals is not correct in treating the Bank of Metropolis case as still binding, it is equally im-

portant that its error should be corrected before it is followed by other courts, and before the conflict between State and Federal Courts on this subject has developed any further.

Respectfully submitted,

Arthur Stewell,
Jno D Little
Marion Smith
Max F Goldstein

Attorneys for Petitioner.

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. [illegible]

FULTON NATIONAL BANK OF ATLANTA,

Petitioner,

vs.

L. S. ROGERS, ET AL,

Respondents.

BRIEF FOR L. S. ROGERS, Respondent.

INDEX

SUBJECT INDEX

CASES CITED OR QUOTED

IN THE
SUPREME COURT
OF THE
UNITED STATES

FULTON NATIONAL BANK OF ATLANTA,
Petitioner

vs

I. S. HOZIER, ET AL
Respondents

No. 260
On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR I. S. HOZIER, RESPONDENT

ADDITIONAL STATEMENTS OF FACT

Imbrie & Company were brokers and traders in stocks and bonds and other securities, having their principal office in New York and maintaining a branch office in Atlanta during the latter part of 1920 and early part of 1921; that the Atlanta branch had a general bank account in the Fulton National Bank and on Oct. 1st, 1920, became indebted to the bank on a demand note for $25,000.00 at which time Imbrie & Company agreed to keep a balance on account equal to one-fifth of its indebtedness to the bank with the

understanding that if and when the balance of said account should fall below this requirement, said note would be called by the bank. In January, 1921, the bank made an additional loan to Imbrie & Company (evidenced by note of $7,800.00), and notified Imbrie & Company that if its future balance should fall below one-fifth of the total indebtedness the loans would be cancelled and Imbrie & Company (through its Atlanta Manager) agreed to keep, subject to being charged off against its said loans from the bank, a balance on account with the bank equal to the requirement. On February 21st, 1921, intervener placed an order with Imbrie & Company for certain stocks and delivered his check of $2,656.13 to Imbrie & Company to pay for same. Imbrie & Company deposited the check in question to its general account in the Fulton National Bank on February 23rd, 1921, but never purchased and delivered the stock to intervener. The bank collected the check and credited the proceeds to the account of Imbrie & Company. The bank balance of Imbrie & Company in the Fulton National Bank did not between February 23rd, and March 3rd, 1921, fall below an amount equal to one-fifth of the indebtedness due the bank by Imbrie & Company, or within $2,656.13 of the minimum amount which Imbrie & Company had agreed to maintain as its balance for the protection of the bank as set forth above. On March 3rd, 1921, legal proceedings were instituted in the District Court of the United States for the Southern District of New York, resulting in the appointment of Receivers for Imbrie & Company there and subsequently local Receivers for Imbrie & Company there and subsequently local Receivers for Imbrie & Company were appointed under ancillary proceedings in this jurisdiction. On March 3rd, 1921, Imbrie & Company's balance in the Fulton National Bank was $27,950.65 and on that date Imbrie & Company were indebted to the bank $32,800.00 covered by the $25,000.00 demand note and the $7,800.00 note due April 1st, 1921, and the

bank applied on that date the Imbrie & Company balance on the said indebtedness of Imbrie & Company to the bank. The bank did not on February 23rd, 1921, or between that date and March 3rd, 1921, have actual notice and was not chargeable with notice that Hozier had or claimed to have title to or interest in said check of $2,656.13 which Imbrie & Company deposited in the bank on February 23rd, 1921. The Fulton National Bank did not on February 23rd, 1921, or thereafter extend credit to Imbrie & Company or act or refrain from acting on faith of the deposit of said check for $2,656.13 as the property of Imbrie & Company. (See Master's Findings of Fact, Record Pages 70, 71, 72, and 73, also Condensed Statement of the Evidence, Page 106.)

BRIEF AND ARGUMENT

The first error complained of is that the Court erred in holding the bank liable to Hozier under the facts found by the Master and shown by the undisputed evidence.

The second error complained of is that the Court had no jurisdiction of the intervention of Hozier and no jurisdiction to make the Fulton National Bank a party.

HOZIER'S RIGHT AGAINST BANK

It is respectfully submitted that the Court did not err in holding the bank liable to Hozier.

HOZIER'S CHECK DELIVERED TO IMBRIE & COMPANY CREATED A TRUST FUND

Hozier having delivered the check to Imbrie & Company for the specific purpose of buying for him forty-five

shares of American Woolen Stock, made said delivery a 'Trust Fund in the possession of Imbrie & Company.

National Bank vs. Life Insurance Co., 104 U. S. 54 (26 L. Ed. 693, 699, 701).

In Re:—Lindsley & Co., 185 Fed. 684 (1).

In Re:—Brown & Co., 189 Fed. 440.

Southern Cotton Oil Co. vs. Elliott, 218 Fed. 567, 570.

Definition of Trusts, 39 Cyc., Pages 17 and 70.

DEPOSITING MONEY IN BANK DID NOT CHANGE TRUST CHARACTER

When this money was deposited in bank by Imbrie & Company to their general credit as a general depositor, its trust character was not destroyed, and Hozier had the right either to recover said money or become vested with the beneficial right to the *chose in action, or debt* that was thus created on the part of the bank to Imbrie & Company.

National Bank vs. Life Insurance Co., 104 U. S. 54 (1) (26 L. Ed. 693).

Union Stock Yards vs. Gillespie, 137 U. S. 411 (34 L. Ed. 724).

Shotwell vs. the Bank, 1915 (A) L. R. A. 715 (140) 147 N. W. 288.

Cady vs. the Bank (Neb) 65 N. W. 906, and discussion on page 908, with cases cited.

Boyle vs. N. W. National Bank (Wis.) 103 N. W. 1123, 1126.

Auburn First National Bank vs. Eastern Trust & Banking Co. (Me), 79 Atlantic 4, 5.

While it is recognized that where a Trustee deposits trust money to his general account in a bank he is allowed to draw it out on check and the bank can not be held liable for its misappropriation when so drawn out, the bank having the right to assume, even with notice of the trust relation, that the trustee will appropriate the money in the proper way, it is further held that where the deposit account represents a mixture of trust funds and personal or individual funds, all of the funds will be considered as trust funds, and this applies to a bank deposit.

National Bank vs. Life Insurance Co., 104 U. S. 54 (3) (26 L. Ed. 693 (3).) 39 Cyc. Pages 536, 538.

The presumption is that in drawing on mixed funds the trustee draws out his own funds and not those of his cesti que trust.

39 Cyc. 539 (d) 540. 3 R. C. L. 552-553.

Board of Commissioners vs. Strawn, 157 Fed. 49.

British N. American Bank vs. The Ansgar, 137 Fed. 534.

Woodhouse vs. Crandall, 64 N. E. 292.

In Re:—Berry, 147 Fed. 208.

Clark Sparks & Sons Mule & Horse Co. vs. Bank, 230 Fed. 738-742 (4).

In Re:—A. Bolognesi & Co., 254 Fed. 770.

Southern Cotton Oil Co. vs. Elliott, 218 Fed. 571.

RELATION BETWEEN IMBRIE & COMPANY AND FULTON NATIONAL BANK AS TO MONEY PLACED ON DEPOSIT IS THAT OF CREDITOR AND DEBTOR

Of course, as to any notes that were due Imbrie & Company to the bank, Imbrie & Company was debtor and the bank was creditor. On the other hand, as to the deposit in the bank, Imbrie & Company was creditor and the bank was debtor.

BANK'S RIGHT OF SET OFF

As between the Bank and Imbrie & Company upon any settlement had between them or upon the maturity at any time of the debt due by Imbrie & Company to the Bank, the Bank had the right to set off its debt to Imbrie on account of Imbrie's debt to it. This is a right that has existed for a long time under principles of common law, is recognized by the Code of Georgia, and is thoroughly recognized by the authorities, State and Federal, in this country. Georgia Code Sections 4339, et sequitur.

Park's Annotated Code of Georgia, Vol. 3.

Article 7, *Section 4339. Set-off.* Set-off is a defense which goes not to the justice of the plaintiff's demand, but sets up a demand against the plaintiff to counterbalance his in whole or in part.

Section 4340. What may be set off. Between the parties themselves any mutual demands, existing at the time of the commencement of the suit, may be set off.

What is called a bank's lien on deposits is really nothing but the application of this rule of set off, and the use of the term "bank lien" is merely a use for convenience, as is clearly shown by all of the cases which have discussed the matter. 7th C. J. 653, Paragraph 351.

3 R. C. L. 588, paragraph 217, also 589, 591, 593;

5 Cyc. 550;

Farmers & Merchants Bank vs. Farwell, 58 Fed. 633, 634, and 635;

N. Y. Co. National Bank vs. Massey, 192 U. S. 138, (48 L. Ed. 380, 384);

Cumberland Glass Manufacturing Co. vs. DeWitt, 237 U. S. 447;

State vs. Brobston, 94 Ga. 95;

Davenport vs. State Banking Co., 126 Ga. 136.

In the case of Davenport vs. State Banking Co., 126 Ga. 136, the Georgia Supreme Court clearly recognizes the rule that the right of the bank to set off mutual demands as to the account of a depositor is not a lien, and, therefore that its failure to exercise the same does not act to release a security on the note.

On pages 144, 145, and 146, the Court discussed the actual relation that exists between a bank and a depositor, where the depositor has borrowed money from the bank, and discusses the so-called banker's lien, that was originally referred to by counsel representing the Fulton National bank. The Court says:—

> "One ground upon which it has been held that a surety upon a note held by a bank is discharged, if, at the maturity thereof, the banks holds on general deposit for the maker a sum sufficient to pay the note. which it permits to be checked out. is that the bank has a lien upon such deposit of the principal debtor to the extent of its claim against him, and ought, in justice to the surety, to enforce it for his protection. Zane on Banks and Banking, Par. 114; Sheldon on Subrogation, Par. 124; and cases cited. We do not see how a bank has a lien upon the general deposit account of its debtor to secure his indebtedness to it. When money is deposited in a bank upon general deposit account. it ceases to be the money of the depositor and becomes the absolute property of the bank, and the relation between the bank and depositor is that of debtor and creditor, the bank becoming indebted to the depositor in the amount of his deposit, and the debt being payable when, and in such amounts thereof, as the creditor may, by written order or check, demand. A general deposit of money in a bank 'is a loan, and transforms the funds from ready money into a chose in action'. Ricks vs. Broyles, 78 Ga. 610; Morse on Banks and

Banking, 30, 42; Newmark on Bank Deposits, Par. 105. As the bank holds no funds or property of the depositor, but is merely his debtor in a given amount, how can it be said the bank has a lien upon the deposit to secure its claim against the depositor? Let us state this lien proposition. Smith owes the bank and the bank owes him, each has a chose in action against the other, and to secure the payment of its claim against Smith, the bank has a lien upon the chose in action which he holds against it. We fail to see how one can hold a lien upon his own indebtedness to another, upon a mere chose in action which the other holds against him.

"When a bank which holds a note against one of its depositors charges it up against the depositor on his deposit account and marks the note paid, it is not availing itself of any lien against the funds of the depositor in its hands, but is availing itself of a right, which has become pretty generally recognized, to set off against its indebtedness to the depositor the amount of his indebtedness to it."

Along the same general line, see also the following authorities:—

Farmers & Merchants Bank v.s Farwell, 58 Fed. 633-634-635.

Irish vs. Citizens Trust Company, 163 Fed. 880, 886, 888.

In fact, a great many of the cases, which, in our opinion, do not state the true rule with reference to when a bank may not take advantage of this right to set off, recognized that, while such a privilege is, for convenience, called a "banker's lien", it is not such a lien, but is merely the right of set off, fully recognized in favor of all mutual credits

under the principles of common law. See the following cases:—

Shuman vs. Citizens State Bank, 174 N. W. 388 (5).

Wynn vs. Tallapoosa Co. Bank, 53 Sou. 228 (Headnotes 20 & 21).

Furber vs. Dane, 89 N. E. 227-230.

Gunn vs. Stock Yards State Bank, 155 Pac. 796.

Cochran vs. First State Bank of Pickton, Tex., 201 S. W. 572, 574 (2 & 3).

Moreland vs. Peoples' Bank of Waynesboro, 74 Sou. 828 (2, 3).

Niblack vs. Park National Bank of Chicago, 48 N. E. 438, 439.

Bank of Marysville vs. Windisch-Muhlhauser Brewing Co., 33 N. E. 1054.

Bank of Lawrenceville vs. Rockmore, 129 Ga. 582, 587.

FEDERAL RULE OF SET OFF

Under the undisputed evidence and the findings of fact, the bank did not extend any new credit to Imbrie & Company upon faith of the deposit of Imbrie & Company, nor did it because of said deposit, forbear to declare all of its

indebtedness due. The agreement that Imbrie & Company had with the bank required Imbrie & Company to keep on deposit one-fifth of their indebtedness to the bank. This required Imbrie & Company to keep on hand at the bank not less than approximately $6,600.00. From the time of the deposit of the Hozier check the bank's balance at no time fell below the sum of $15,754.70 (Record, page 106).

In order to consider the Federal Rule of Set Off it is necessary to realize that the right of the beneficiary is to trace his money into any property into which it has been converted, and that this right has been recognized where the money goes into a deposit in the trustee's bank.

In Bank vs. Conn. Mutual Life Ins. Co., 104 U. S. above cited, the third headnote is as follows:—

> "That so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust funds with his own, the whole will be treated as the trust property except in so far as he may be able to establish what is his own, are established doctrines of equity and apply in every case of a trust relation, and to moneys deposited in a bank account and the debt thereby created, as well as to any other description of property."

See also 26 R. C. L. pages 1348, 1349, 1350 Section 214 and numerous other cases cited. The right of the beneficiary in this regard is equitable in its character, the legal title being in the trustee.

Counsel for the bank has taken the position that money

and negotiable instruments passed by delivery and that the title of one acquiring them in good faith is unaffected by a want of title in the vendor or by secret equities of third parties, and also took the position that when taking such instruments or money in payment of a pre-existing debt is a holder for value and within its protection. He cited the case of Swift vs. Tyson, 16 Peters 1 (10 L. Ed. 865) as sustaining such principle. An examination of Swift vs. Tyson and the authorities that have approved and recognized the doctrine announced in that case shows that it has no application in the present case. The principle announced in Swift vs. Tyson is as follows:

> "There is no doubt that a bona fide holder of a negotiable instrument, for a valuable consideration, without any notice of the facts which implicate its validity, as between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title, unaffected by those facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity.
>
> "The holder of negotiable paper, before it is due, is not bound to prove that he is a bona fide holder, for a valuable consideration, without notice; but the law will presume that, in the absence of all rebutting proof, and, therefore, it is incumbent on a defendant to establish by way of defense satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff."

And the Court says further:—

> "That a pre-existing debt does constitute a valuable consideration, in the sense of the general rule already stated, **as applicable to negotiable instruments.**" (Ours.)

An investigation of this question will show that the rule announced in Swift vs. Tyson is, not only in that case but by the great weight of authority, restricted to negotiable papers.

See also Peoples' Savings Bank vs. Bates, 120 U. S. 556 (30 L. Ed. 754); Price vs. The Elm Bank 72 Fed. Rep. 610.

The same principle that is set forth in the case of Swift vs. Tyson is recognized in the Ga. Code. See Secs. 4286 et sequitur. Sec. 4286 provides:—

> "The bona fide holder for value of a bill, draft or promissory note or other negotiable instrument, who receives the same before it is due, and without notice of any defect or defense, shall be protected from any defenses set up by the maker, acceptor or endorser, except the following: (1) non est factum: (2) gambling or immoral and illegal consideration; (3) fraud in its procuring."

It will be seen from an investigation of the above authorities and the principles therein announced that the case of Swift vs. Tyson is absolutely sound, but that it does not apply in the present case. Imbrie & Company did not turn over any negotiable instrument to Fulton National Bank, in payment of its indebtedness. The check of Hozier, drawn in favor of Imbrie & Company, was not delivered to the Bank to be applied as a credit to the notes held by the Bank against Imbrie, nor did the Bank receiev this check for that purpose. On the contrary, this check was deposited to the general deposit account of Imbrie & Company, and, as heretofore stated, having been so accepted by the Bank, lost its identity as a negotiable instrument and, when collected by the Bank, had the effect of creating an indebtedness on the part of the Bank to

Imbrie & Company. The ledger account of the Bank shows that this deposit, together with various other deposits put in Bank by Imbrie & Company, were so considered by the Bank, and that Imbrie's claim against the Bank, represented by their deposit, was a chose in action, and certainly remained such until March 3, 1921, when the Bank, upon notice of Imbrie's failure, charged off this deposit in favor of the Bank's indebtedness against Imbrie. It will thus be seen that the Bank did not part with anything of value, nor did it take an assignment of the chose in action due by it to Imbrie & Company, which, under the laws of Georgia, can only be transferred in writing. Code Sec. 3653, and construction thereof in the following cases:—

Section 3653. Assignment of choses in action. All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable.

Kirkland vs. Dryfus & Rich. 103 Ga. 130, and cases cited.

Mutual Life Ins. Co. of N. Y. vs. Watson, Admx. 30 Fed. 653, where Judge Speer says (Headnote 3) that

> "An assignment of a chose in action in Georgia, to be valid, must be in writing."

On page 656, the Court, discussing this question, says:—

> "This is the construction placed on Sec. 2244 (Now Sec. 3653) of the Code of Georgia, and is binding on this court."

There is no pretense in this case that Imbrie & Company transferred or assigned its chose in action to the Bank in payment pro tanto of its indebtedness to the Bank. In fact, at the time that the Bank applied the balance on Imbrie & Company's deposit to the notes held by it against Imbrie & Company, Imbrie & Company were in the hands of receivers, and could not have made any such assignment.

We hope we have made clear our view of what it was that the bank was dealing with, viz:— it was attempting to wipe out by its conduct the chose in action which Imbrie & Company had the legal title to against the bank and to which Hozier had the equitable right.

Having, as we think, clearly fixed the status of Imbrie & Company, Hozier, and the Bank, with reference to the deposit of Hozier's check, we come to the question of the rule in Federal Courts with reference to the right of a creditor to set off as against a debt due to it an indebtedness the legal title to which is in its debtor but in which a third person has a beneficial or equitable interest. In his opinion, the Master who heard this case (Record, page 78) says:—

> "The equitable principle established in the Bank of Metropolis & Wilson cases is applicable to and in the master's opinion controls the pending suit."

In the opinion of the District Judge (Record, pages 88 to 90) the same conclusion is reached and is tersely and clearly presented.

The rule is expressed in the case of Wilson & Co. vs. Smith, 3rd Howard 763 (11 L. Ed. 820) and in the case of Bank of Metropolis vs. New England Bank. 6 Howard

212, (12 L. Ed. 409) and the same case 1st Howard 234. (11 L. Ed. 115).

In the case of Wilson vs. Smith, it appears that one Holcomb drew a draft or bill of exchange upon Chas. F. Mills, of Savannah, which was accepted by said Mills. This draft became the property of Thos. Wilson & Co., who lived outside the State of Georgia. For the purpose of collection, it was endorsed by Thos. Wilson & Co. and sent to David W. St. John, of Augusta, Georgia. St. John forwarded this bill of exchange to Horace Smith, who was St. John's agent at Savannah. Smith collected the money, and St. John, having then failed in business and having died and being indebted to Smith at the time of his failure and death, defendant undertook to set off the amount of this collection as a credit on St. John's indebtedness to defendant.

It further seems that St. John had given Smith collateral securities to protect his indebtedness to Smith, and that Smith had, up to the time of St. John's failure, been satisfied with the securities held by him. Smith had no notice that the bill of exchange was not the property of St. John at the time he applied its proceeds as a credit on the indebtedness of St. John to him. The bill of exchange bore all of the indicia of ownership in St. John. It will be seen that, except that Smith does not appear to have been a banker, the facts in that case are extremely similar to those in the present case.

The case of Wilson vs. Smith was certified to the Supreme Court of the United States, on the question of privity, that is, whether such privity existed between Wilson & Co. and Smith as that Wilson & Co. could bring a suit in their own name against Smith. The Court, after ruling that question, says:—

"Another question has been raised in the argument, that is, whether the defendant has a right to retain on account of the money due to him from St. John. As this point has not been certified, it is not regularly before the Court. Yet, as it has been fully argued on both sides, and evidently arises in the case, **it seems proper to express our opinion upon it, as it may save the parties from further litigation and expense.**"

"Upon this part of the case, as well as upon the question certified, we think the case of THE BANK OF METROPOLIS VS. THE NEW ENGLAND BANK decisive against the defendant. It appears from the statement that he made no advances, and gave no new credit to St. John on account of this bill. He merely passed it to his credit in account. Now, if St. John had owed him nothing, upon the principles we have already stated, the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of The Bank of Metropolis vs. The New England Bank, it appeared in evidence that there had for a long time been mutual dealings between these two banks, in the collection of money for each other, and that balances were suffered to remain and credit given upon the faith of the paper transmitted or expected to be received, according to the usual course of their business with one another. And the Court held, that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money; the hazard he ran by the extension of the credit giving him as just and equitable right to retain as if he had incurred responsibility by an advance of money. The right to retain, in that case, depended upon the fact that

> credit was given. But in the case at bar this fact is expressly negatived, and there is no ground therefore, upon which he can retain, according to the principles decided in the case referred to."

In the hearing before the master and the District Judge, counsel for the bank conceded that if the case of Bank of Metropolis vs. New England Bank, 6 Howard 212, correctly expresses the Federal Law on the subject now involved, that Hozier is entitled to recover from the Fulton National Bank, provided the Court has jurisdiction to determine the question. Counsel, however, insisted that the case of Bank of Metropolis has been impliedly overruled by two subsequent cases, viz:— Bank vs. Insurance Company. 104 U. S. 54 and Bank vs. Gillespie. 137 U. S. 411.

The Bank of Metropolis case was before the Supreme Court twice.

In the first case, the Court discusses at some length the course of dealing between Commonwealth Bank of Mass. and the Bank of Metropolis. It seems that the New England Bank forwarded certain drafts, etc., to the Commonwealth Bank, which, in turn, forwarded these papers to the Bank of Metropolis. The course of dealing between the Bank of Commonwealth and the Bank of Metropolis for years had been that notes, drafts, and other papers to be collected, that were sent by one bank to the other, would be collected and credited to the account of the forwarding bank, these balances being allowed to remain as a basis of business dealings. Evidently upon advice to the forwarding bank of the payment of such papers, such bank would credit the real owners of such papers, or pay to such real owner the value thereof. The Supreme Court held that, because of such mutual deal-

ings, the Bank of Metropolis allowed the Commonwealth Bank to become and remain indebted to it, because it, in turn, was becoming indebted to the Bank of Commonwealth, and could offset the amounts due to it by the Bank of Commonwealth, as against the amounts due by it to the Bank of Commonwealth.

The Court, on page 239 (116) used this language:—

> "The paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without any consideration, and as its agent in the ordinary course of business; it being usual, and indeed necessary, so to indorse it, in order to enable the agent to receive the money. Yet the possession of the paper was prima facie evidence that it was the property of the last-mentioned bank; and without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would be hardly disputed.
>
> "We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties.
>
> "There does not, in deed, appear to have been any express agreement that those balances should not be immediately drawn for, but it may be implied from the manner in which the business was conducted; and if the accounts show that it was their practice and understanding to allow them to stand and await

> the collection of the paper remitted, the rights of the parties are the same as if there had been a positive and express agreement; and such mutual indulgence on these balances would be a valid consideration; and, like the actual advance of money, give the plaintiff in error a right to retain the amount due on closing the account.
>
> "If, therefore, the jury find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be, and trusted each other as the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of the dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account."

When this case was returned to the Circuit Court the Judge evidently misconstrued the decision of the Supreme Court, and the Court again reviewed the case, and rendered the following opinion (pages 226, 227 (415)):—

> "It is not usual in remanding a case to state in the opinion of this Court the particular manner in which the instructions to the jury should have been framed, but to state in the opinion the principles of law which govern the case, as it appears in the record, and leave it to the Circuit Court to apply them to the case, as it may appear in evidence upon the second trial, in such manner and form as it may think advisable. From the manner, however, in which the directions of the Circuit Court appear in the record before us, upon the trial under the mandate, we may perhaps prevent future difficulty by stating the form in which instructions to the jury might have been given so as

to carry into effect the opinion of this Court, and enable the jury to understand more clearly the points in issue before them. Of course we do not mean to prescribe this form to the Circuit Court when the case again comes before it, because the testimony then offered may differ materially from that now contained in the record. But if, instead of the complex instructions under which the case was decided at the last trial, the following directions had been given, it would have conformed to the opinion of this Court when the case was formerly before it, and at the same time have enabled the jury to understand more distinctly the matters of fact in dispute between the parties, and submitted them for decision.

"1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank.

"2. And if the Bank of Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balance suffered to remain in its hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of the dealings between the two banks.

"3. But if the jury found that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and trusted the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the con-

> trary, and upon the credit of such remittances made or anticipated in the usual course of dealings between them balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank.
>
> "We restate the former opinion of this Court in this form, because we presume it must have been misunderstood by the Circuit Court. And as it was not followed in the proceedings under the mandate, the judgment must be reversed, and the cause remanded, with directions to award a venire facias de nove."

It will, therefore, be seen that the Supreme Court of the United States expressly decided not only the effect of notice and what would result from notice, but also what it would be necessary for the retaining bank to show, even where it had no notice and notice was not imputable to it.

It appearing that the Bank of Metropolis case, if still the law, makes certain the right of Hozier to recover from the bank, it becomes necessary, briefly, to reconsider the contention of counsel for the bank that this case has been impliedly overruled by the two cases above cited.

We have already cited the Insurance Company case as authority to show that the relation existing between depositor and the bank is one of creditor and debtor, and that the depositing of trust money in the bank does not destroy its status as a trust fund, nor is the beneficial owner prevented from tracing said fund into the resulting chose in action. Counsel for the Bank, however, contend that

this decision shows that the Court based its conclusion on the fact that the Bank was chargeable with notice of the trust relation that existed between the depositor, whose account was made out in his name, as General Agent, and the Insurance Company, for which he was general agent, and that the principal business involved in the opening of that account was for convenience in handling the moneys of the principal coming into his hands, as agent, and counsel quotes certain language in this decision as establishing that, except for notice chargeable to the Bank, the Bank could have retained this fund against the principal in this case.

The language referred to by the counsel for the Bank is found on page 701 of the Lawyers' Edition, where the Court is discussing what is there called the "Banker's lien". Counsel failed to quote the first part of the paragraph, which is as follows:—

> "Evidently the bank has no better right than Dillon, unless it can obtain it through its banker's lien. Ordinarily that attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit."

Whether the Court has reference here to what is technically a banker's lien, which actually exists on securities that come into the hands of the bank as collateral for advances made on faith of such securities, or whether the Court is referring to the right of set off, that exists between all mutual debtors and creditors, it is unquestionably true that the Court has in its mind the fact that, for such right to exist, it must appear that the bank has parted with actual value, on the faith of such securities and moneys. However this may be, an examination of the

Insurance Co. case indicates that the Court never reached the proposition of the liability that would have existed if the Bank had not been chargeable with notice.

In the Lawyers' Edition, a synopsis of the briefs of counsel representing both sides of the controversy is furnished, and it appears that counsel for the plaintiff laid his whole case on the theory that the Bank was chargeable with notice. An examination of the case will show that the Court only discussed the case from the standpoint that the Bank either had actual notice or was chargeable with constructive notice. On page 698, the Court says:—

> "It will be observed that the question arising here is not what the rights of the party would be if the bank, having no knowledge of the character of the account except what might be inferred from the use of the words 'general agents' at its head, the note had been taken up by Dillon's check upon that account."

This language indicates that the Court never found it necessary to discuss the question that would have been raised if it had not been so clearly shown that the Bank had notice. In other words, the Court, if it considered the case of Bank of Metropolis, in the 6th Howard, did not find it necessary to go beyond the first principle of law that it announced in that case.

The Gillespie case is referred to by counsel for the Bank as making clear the doctrine he contends for, his view being that the Gillespie case adopts the principles announced in the Insurance Co. case and, therefore, shows that the Court again has overruled the principles announced in the Bank of Metropolis case. An examination of the Gillespie case clearly shows that the Court again

never reached the question of what the liability of the Bank would have been had it not been chargeable with notice, and again it merely puts in practice the principle announced in the first charge, that it prepared in the Bank of Metropolis case, to be used by the trial judge in that case. Counsel for the Bank quotes two extracts from the Gillespie case, for the purpose of showing that the Court held notice to be essential, and that there could have been no recovery had there not been notice. The language quoted by the Court is found on page 728 of the Lawyers' Edition.

Turning back to page 727, it will be seen that these quotations are used by the Court, not in determining the question of necessity or non-necessity of notice, but in the discussion of the question that the Court of Equity was without jurisdiction, because the plaintiff had his action at law. The language here used is quoted from the Insurance Co. case to the effect that the plaintiff could not have proceeded at law, because his rights were equitable in their character, and, in addition to quoting the 104 U. S., also quotes the case of the Central National Bank vs. Royal Insurance Co. 103 U. S. 783 (26 L. Ed. 459), as thoroughly establishing that the legal title to these deposits was in the depositor, and not in the beneficiary.

It, therefore, must be clear that inasmuch as the language referred to by counsel for the Bank is in regard to an entirely different question, the Court could not have had in mind the questions involved in the Bank of Metropolis case, and either impliedly or expressly a desire to overrule the principles there announced.

Undoubtedly the principle for which respondent contends is now settled under the decisions of the Supreme

Court of the United States. It is the contention of counsel for petitioner that the decisions of the Federal Court have placed said Court "in an attitude of maintaining a doctrine on an important question of commercial law which is out of harmony with the doctrine of the State Courts and the doctrine of the English Courts—in a word, it places the Federal Court in conflict with all other courts whose jurisprudence is founded upon the common law."

Counsel for petitioner cites cases from California, Idaho, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevado, New York, North Dakota, and Pennsylvania, as having decided in favor of the bank on the issue involved, viz., 14 states. A careful examination of the decisions cited will show that the point involved in the present case is not decided by the Courts of several of the States referred to:

CALIFORNIA

The California cases seem to support the bank's contention but are principally based on the section of the California Code giving banks a lien on all deposits.

IDAHO

Counsel for the Bank frankly states: "It is not clear that the point is really involved." An examination of the case cited shows that the question here involved is not decided by that Court.

INDIANA

The case of McEwen vs. Davis, 39 Ind. 109, does not support the bank's contention. In this case it appears that

Davis and Stuckey were partners. Stuckey deposited money with the defendant bank in individual name. Stuckey died. Davis sued the bank, setting up that it was due the partnership a balance on account. It appeared that the bank, for protection of Stuckey, had taken up his note with express understanding that deposit was to be applied to reimburse them. It was held in this case that Davis could not recover as the bank had paid off note in reliance of Stuckey's ownership of the deposit.

IOWA

The case of Allen vs. Brown, 39 Iowa 330, is clearly not in point. This was suit by the bank against a surviving silent partner. Bunnell was the ostensible owner of the business and had an account with the plaintiff bank from which he drew out a large sum of money which he actually used for non-partnership purposes. Later he deposited a larger sum, then overdrew for partnership purposes, owing over $1,000.00 at the time of his death. It was held that the bank was not chargeable with what Bunnell did with the money drawn out by him and that the bank could recover from the surviving partner.

An examination of the case of Smith vs. Crawford Co. St. Bk., 99 Iowa 282, will show that this case is not at all in point and does not decide the question involved in the present case.

The case of Smith vs. DeMoines National Bank, 107 Iowa 620, is clearly distinguishable from the present case because the money on deposit was applied on the bank's debt with the consent of the depositor and the depositor's note was surrendered to him.

We therefore respectfully submit that the State of Iowa is not on record as opposed to the rule laid down in the Bank of Metropolis Case.

KANSAS

The case of First National Bank vs. Valley State Bank, 60 Kansas, 621, on its face will not in our opinion appeal to this Court, and yet in this case it appears that the money claimed was drawn out by the depositor. The next case cited—Kimball vs. Bean, 68 Kansas 598, was where the bank, with the authority of the depositor, applied the money deposited to the overdraft held by it.

The last Kansas case cited, Tough vs. Citizens State Bank, 89 Kan. 583, was where the depositor authorized the bank to pay an indebtedness from his deposit and the bank surrendered the note representing said indebtedness to the depositor.

An examination of these three cases indicates that they are not opposed, when considered in connection with their facts, to the Bank of Metropolis decision.

MARYLAND

The case of Denton National Bank vs. Kenney, 116 Maryland 24, rules in accordance with the contention of petitioner. It seems to us that this ruling is based on a misconception of the relation that exists between a bank and a depositor, after the bank has received a check on deposit, collected it, and placed it to the general deposit account of its depositor.

MASSACHUSETTS

The case of School District vs. First National Bank, 102 Mass. 174, seems to clearly sustain the contention of petitioner. In our opinion this case will not appeal to this Court. There the treasurer of the School District deposited the school money to his own account. He owed the bank money on a promissory note. The bank applied this money to said note. The Court held that with apparently no change in the status of the bank on account of the deposit of this money, the School District could not recover.

In the case of Wood vs. Boylston National Bank, 129 Mass. 358, the Massachusetts Court adheres to the same ruling. The Court uses this language: "It has long been settled that a banker who has advanced money to another has a general lien on all securities of the latter which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement limiting their application." In support of this position the Massachusetts Court cites the Bank of Metropolis cases, 1 Howard 234, 6 Howard 212, and other cases. It seems to us that the Court has misunderstood and misapplied the principles announced in the Bank of Metropolis cases, and that it has confused the law with reference to receiving negotiable instruments as security for a pre-existing debt with the general relation that exists between a bank and an ordinary depositor.

MICHIGAN

Counsel for petitioner cites the Garrison case, 139 Michigan 392, as supporting his contention. We think the principles announced in that case are clearly in line with the ruling of the Supreme Court in the Bank of Metropolis

case. We think the Michigan Court went beyond the Bank of Metropolis case in holding that a book credit is sufficient to change the status between a bank and its depositor so as to affect the rights of innocent owners of a trust fund. It is further interesting to note that the Court, in the opinion in the Garrison case, sets out very fully and apparently with its full approval the decision of the U. S. Supreme Court in the Bank of the Metropolis case. It further cites a number of cases where it says the principles laid down in the Bank of Metropolis Case have been recognized by various courts but repudiated in New York and some other states. The Court then says: "We incline to the view of Mr. Morse that the doctrine of the Supreme Court of the United States is the better one both upon reason and authority." Certainly a reading of the Garrison case should not lead one to believe that that Court has run counter to the principles laid down in the Bank of the Metropolis case.

We also call attention to the case of Burnett vs. First National Bank, 38 Mich. 630. In that case the Court uses this strong language:" . . . But we are not aware of any principle which will enable a depositary who has received from a trustee or agent a fund belonging in fact to the principal or beneficiary to appropriate by his sole act to his own debt held against the trustee or agent and thereupon insist that his want of knowledge of the true ownership is sufficient to guard such inequitable appropriation and bar the real owner from pursuing the fund."

We therefore respectfully submit that the Court of Michigan does not sustain the contention of petitioner.

MISSOURI

The State of Missouri has a Supreme Court and certain

courts of appeal. The courts of appeal have final jurisdiction but said courts may certify questions to the Supreme Court or in some instances parties dissatisfied may petition for certiorari from the courts of appeal to the Supreme Court. We call attention to this for the reason that the Supreme Court of Missouri, in the case of Millikan vs. Shapleigh, 36 Mo. 596, has brought itself squarely within the rule laid down in the Bank of the Metropolis Case. The Missouri court cites and follows the Bank of Metropolis case and also cites the case of Wilson vs. Smith, 3 Howard 763.

An examination of the case of Wilson vs. Farmers First National Bank, 176 Mo. App. 73, will show that this case has no application to the issue here involved. The other cases cited appear to have ignored the principle laid down by the Supreme Court of Missouri and to sustain the contention of counsel for petitioner.

As against these decisions we call attention to the case of Bury vs. Woods, 17 Mo. Appeals, 245, which is in line with the decision of the Missouri Supreme Court and which also cites the Bank of Metropolis and the Wilson cases.

NEBRASKA

The case of Globe Savings Bank vs. National Bank of Commerce, 64 Neb. 413, follows the Central National Bank vs. Conecticut Mutual Life Insurance Company, 104 U. S. 54. It was held in that case that the bank had actual notice of the equities of the plaintiff and plaintiff was allowed to recover.

NEVADA

Counsel for petitioner cites the case of McStay Supply Company vs. Stoddard, 35 Nev. 284. In this case Stoddard, an agent of the plaintiff, made a collection and deposited the amount collected in his account. At that time he owed the bank on past due notes a sum in excess of his account, including the deposit. The bank at that time had no knowledge of the trust nature of the funds. Stoddard failed, and the bank applied the entire deposit account to Stoddard's indebtedness. Prior to the application, the bank had learned of plaintiff's claim to the funds. It was held that the bank was liable to plaintiff, as it had no right to apply funds in satisfaction of Stoddard's indebtedness to it. It will appear that the decision in this case was based on the Gillespie Case, 137 U. S. 411, and Insurance Company Case, 104 U. S. 54, on the theory that the actual application of the money by the bank was after notice of the claim of the real owner. It is true in this case that many authorities are cited, notably the Bank of the Metropolis case. What the Court says with reference to an agent taking out money permitted to be deposited by the owner or subjecting it to a lien undoubtedly is true with proper application. We do not think the Nevada case can be construed as authority contrary to the principles announced in the Bank of Metropolis cases.

NEW YORK

The first New York case referred to, Hatch vs. Fourth National Bank, 147 N. Y. 184, was decided on an agreement made by the depositing broker that his deposits and all funds on hand could at any time be applied by the bank on a call loan that the bank had made to him. The decision in this case was based squarely on an express agreement by virtue of which the bank made the loan.

In the case of Hutchinson vs. Manhattan Company, 150 N. Y. 250, there is nothing inconsistent with the rule laid down in the Bank of the Metropolis case. A broker was in possession of certain money belonging to plaintiff. He placed this money to his individual fund in the defendant bank. Later he secured a loan with the express agreement that the deposit should be security for the loan. The broker failed and the bank applied the deposit to the account. It was held that the bank, having loaned money, relying on the broker's title, had a superior claim to the plaintiff.

In the case of Meyers vs. New York County National Bank, 55 N. Y. Supp. 504, the Court sustained the bank's action on the theory that there was an implied agreement, although no express agreement, and took the position that the facts in the case brought it within the rule laid down in the Hatch case.

In London & River Plate Bank vs. Hanover National Bank, 55 N. Y. Supp. 941, there was an actual written agreement signed by the depositor permitting a set off.

In the case of Carlisle vs. Norris, 215 N. Y. 400, the right of a bank to a lien or the privilege of set off is not involved—in fact no rights of a bank are involved.

An analysis of the New York cases will therefore disclose that with the exception of the Meyers case, the New York cases are not contrary to the principles announced in the Bank of Metropolis cases. The Meyers case extends the doctrine of the Hatch and Hutchinson cases beyond the principles authorized in said cases.

NORTH DAKOTA

In Shuman vs. State National Bank, 27 North Dakota, 599, the Supreme Court of North Dakotta squarely recognizes that a bank has the right of set off where it has no notice which is superior to secret equities.

PENNSYLVANIA

In Laubach vs. Leibert, 97 Penna. 55, Leibert as assignee of Krauss opened an account with the Dime Savings Institution and deposited money belonging to the estate of the assignee. Leibert owed the bank individually, and gave the bank checks on his account as assignee in payment of the debt. The bank had failed and was being operated by Laubach as assignee, who sued Leibert for the full amount of Leibert's debt to the bank, not applying checks. Leibert claimed payment to the extent of the checks that he had given on his account as assignee. The Court held that the bank was bound to accept the checks. The Pennsylvania case, therefore, does not support the contention of petitioner.

We think an examination of the authorities cited in the brief of counsel for petitioner will show that the only states whose courts squarely support the contention of petitioner are CALIFORNIA, KANSAS, MARYLAND, MASSACHUSETTS, and NORTH DAKOTA; that the courts of NEW YORK lean towards the contention of petitioner; that the court of last resort of MISSOURI is against the contention of petitioner, although there are some decisions of their courts of appeals supporting petitioner's contention; that the courts of IDAHO, INDIANA, IOWA, NEVADA and

PENNSYLVANIA do not support the contention of petitioner but do not seem to have ever clearly passed on the question; and that the Supreme Court of MICHIGAN is against the contention of petitioner.

The following cases in our opinion squarely sustain the principles laid down in the Bank of the Metropolis case:

Cady vs. South Omaha National Bank, 46 Neb. 756, 65 N. W. 906.

Shotwell vs. Sioux Falls Savings Bank, 34 South Dak. 109, L. R. A. 1915 A, 715, 147 N. W. 288.

Davis vs. Panhandle National Bank, Tex. Civ. App., 29 S. W. 926.

Burnett vs. First National Bank, 38 Mich. 630.

Millikan vs. Shapeleigh, 36 Missouri 596.

Bury vs. Woods, 17 Missouri App. 245.

Lawrence vs. Stonington Bank, 6 Connecticut 521.

Paul Heymann vs. Hamilton National Bank, decided by the Supreme Court of Tennessee Dec. 13, 1924.

We therefore respectfully submit that a careful examination of the decisions of the State Courts will show that the principles announced in the Bank of Metropolis cases have been adhered to by the courts of at least seven states; that the application of the principles of the Bank of Metropolis cases has not been adhered to by the courts of six states; that there are thirty-two states that so far as we

have been able to ascertain have never passed on the question. We therefore respectfully submit that there is no reasonable basis for the assumption that the principles laid down in the Bank of Metropolis case are not in harmony with the prevailing rule of law on the subject. The Federal rule is sound and should be maintained.

JURISDICTION

It is respectfully submitted that the Court had jurisdiction of the Hozier intervention and to make Fulton National Bank a party.

The United States Court for the Northern District of Georgia assumed charge of the Atlanta agency of Imbrie & Company, appointed receivers, and gathered into its custody a ndpossession all of the assets of that Company in this jurisdiction. Hozier had a claim against the Atlanta agency. He was by the terms of the order appointing receivers enjoined from taking any independent steps to prosecute his rights against sa'd Atlanta agency (Record Pages 36 and 37), and necessarily would be without remedy as to those rights unless allowed by the Court to intervene in the cause in which the Court had gathered to itself all of the assets of said agency. Hozier having the right to intervene, it would seem clear under the authorities that the Court was authorized to bring into the proceedings all parties whose presence would be necessary or proper to a complete adjudication of the issues involved.

White vs. Ewing, 159 U. S. 36 (40 L. Ed. 67);

Porter vs. Sabin, 149 U. S. 473 (37 L. Ed. 815);

Bottom vs. National Railway Building and Loan Association, 123 Fed. 744;[*]

Peck vs. Elliott, 79 Fed. 10;

Ross, Meehan, Brake Shoe Company vs. Southern Malleable Iron Company, 72 Fed. 957;

Hollander vs. Heaslip, 222 Fed. 808;

Hume vs. City of New York, 255 Fed. 488;

Pell vs. McCabe, 256 Fed. 512, 515;

Gas & Electric Service Company vs. Manhattan & Queens Traction Corporation, 266 Fed. 625;

Equity Rule No. 37;

Rhinehart vs. Victor Talking Machine Company 261 Fed. 646, construing Equity Rule 37;

Simkins Federal Equity Suits, Page 467, also Page 182;

Consolidated Gas Company of New York vs. Newton, Attorney General, et al, 256 Fed. 238;

Cincinnati I. & W. Railroad Company vs. Indianapolis Union Railway Company, 279 Fed. 356;

Rocca vs. Thompson, 223 U. S. 317 (56 L. Ed. 453);

Caldwell vs. Taggart, 4 Peters 190 (7 L. Ed. 828).

In addition to the above autohrities, we respectfully refer to the discussion on the question of jurisdiction in the

instant case by District Judge Sibley, Record Pages 82, 83, 84, 85 and 86, and also the discussion on the question of jurisdiction in the opinion of the Circuit Court of Appeals, Record Page 115.

Respectfully submitted,

Albert S. Harvell, Jr.

Hugh M. Dorsey

Andrew Sturgeon